RECORD, CASE NO. 15062.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1092.

DAVID S. STANLEY, W. R. GIBSON, S. T. CUSHING, J. C. BAILY, AND THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,

vs.

MARY U. SCHWALBY, J. A. SCHWALBY, AND JOSEPH SPENCE, JR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

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1 *Caption.*

THE STATE OF TEXAS,
County of Bexar:

At a term of the district court of the 45th judicial district, begun and holden at San Antonio, within and for the county of Bexar, before the Hon. W. W. King, and ending on the 20th day of May A. D. 1890, the following case came on for trial, to wit:

MARY U. SCHWALBY ET AL., PLAINTIFFS,
vs.
DAVID S. STANLEY ET AL., DEFENDANTS. } No. 191.

Original petition.

In Bexar County district court. To March term, A. D. 1889.

THE STATE OF TEXAS,
County of Bexar:

To the Hon. District Court of said County of Bexar:

Your petitioner, Mary U. Schwalby, who is herein joined by J. A. Schwalby, her husband, complaining of David S. Stanley, William R. Gibson, Samuel T. Cushing and Doctor Bennett, respectfully represents:

That petitioner resides in the county of Grimes, State of Texas; that defendants reside in said county of Bexar; that heretofore, to wit, on the first day of February, A. D. 1889, your petitioner was lawfully seized of the following described real estate situated in said county of Bexar, holding the same in fee simple; and that petitioner is entitled to such possession;

2 that afterward, to wit, on the 2nd day of February, A. D. 1889, defendants unlawfully entered upon and dispossessed petitioner of said premises and withhold from her the possession thereof; that the premises so entered upon and unlawfully withheld from petitioner are described thus:

"All that certain tract or parcel of land situate, lying, and being in the city of San Antonio, in the county of Bexar and State of Texas, described as follows, to wit: Lot No. one (1) in block No. two (2), being a subdivision of original lot No. one, in range No. four, in district number one, of the city tract of said city of San Antonio, on the east side of the San Antonio River, according to the map and survey of said city; said subdivision being according to the plan thereof made for Anthony M. Dignowity by G. Freisleben, city surveyor of said city; said lot has a front of thirty-two varas on Grayson street and a depth of ninety varas."

Petitioners pray that defendants may be cited according to law that they have judgment for the recovery and possession of said premises, for costs of suit and for general relief.

GEO. C. ALTGELT,
Att'y for Pl'ff.
JOS. SPENCE, Jr.,
Att'y for Pl'ff.

Filed February 23rd, 1889.

GEO. R. DASHIELL,
Cl'k D. C. B. Co.

Defendant's original answer.

In the honorable district court of Bexar County, Texas, March term, 1889.

MARY U. SCHWALBY,
vs.
DAVID S. STANLEY ET AL. } No. 4053.

Now comes the defendants in the above styled cause, and the said David S. Stanley, answering for himself and for his co-defendants herein, saith:

3 1st. The allegations in plaintiffs' petition are insufficient to allow them to have and maintain this action.

2nd. The said David S. Stanley, for himself and for his co-defendants, saith that as individuals they do not claim, and have no title to the land for which suit is brought, but that they are lawfully in possession thereof as officers and agents of the United States of America, which said United States holds in herself complete title to the property sued for, duly recorded in the clerk's office at Bexar County, Texas, and the said defendant, as an officer of the United States of America in possession, enters the plea of not guilty to all the trespasses and allegations charged against them in plaintiff's petition.

J. G. BALLANCE,
Attorney.

Filed March 8th, 1890.

GEO. R. DASHIELL,
Clk. D. B. C. Co.

Defendant's first amended answer.

In the honorable district court, Bexar County, Texas. 37th judicial district. June term, A. D. 1889.

MARY U. SCHWALBY ET AL.,
vs.
DAVID S. STANLEY ET AL. } No. 4053.

Now come the defendants in the above action, and also comes the United States of America, by her attorney, Andrew J. Evans, acting by and through instructions from the Attorney-General of the United States of America, here exhibited to the court, and with leave of this court, amend their original answer filed in this cause on March 8th, 1889, and in lieu and instead thereof, say:

1st. The allegations in the plaintiff's petition are insufficient to allow them to have and maintain this action.

J. G. BALLANCE and ANDREW J. EVANS,
U. S. Attorney W. D. T., for the defendants, and the United States of America.

4 2nd. That said David S. Stanley, for himself and his codefendants, and the United States of America, by her authorized attorney, say, that as individuals they do not claim any title to the property sued for by plaintiffs, or possession thereof; but aver that they are law-

fully in possession of a certain piece or parcel or tract of land described as follows, to wit:

"Beginning at the northwest corner of this tract, in the lower line of the first donation to the Government, 437 varas east of the Alamo ditch, and 20 varas north of the NE. corner of lot No. 23, range 5, district 1; thence with said lower line of the Government east 244 varas; thence with the east line of abovesaid block No. 2 south 210 varas; thence with the south line of said block No. 2 west 244 varas; thence with the east line of lots No. 22 and 23, range 5, district 1, north 210 varas to the beginning, being block No. two (2), the northwestern part of lot No. one (1), range four, in district one (1), in the city of San Antonio, Bexar County, Texas, containing nine and seven one-hundreths ($9\frac{7}{100}$) acres of land according to a plat and survey made May 22, A. D. 1875, by G. Freisleben, city engineer," which plat is hereto attached and made part hereof, as officers and agent of the defendant, the United States of America, to which said United States of America holds in herself perfect title and right of possession duly recorded in the clerk's office of Bexar County, Texas, for many years last past, to wit, since the year 1875; and the said defendants and the United States of America here admit their possession of all and singular the said lands described herein, but they do not confess that the land set out in plaintiff's complaint is the same or any part of the same described herein, but enter their plea of "not guilty" to all the trespasses and allegations charged against them and the United States of America, and put themselves upon the country.

ANDREW J. EVANS,
U. S. District Attorney.
J. G. BALLANCE,
Attorney for Defendants.

5 And specially pleading, the defendants say that in the year 1875, the city of San Antonio, Texas, purchased of and from Adams & Wickes, A. J. Dignowity, C. P. Smith, and others, and Mrs. Pauline Fox, the property and land set out in this plea, and paid therefor full and valuable consideration, to wit, the sum of five thousand dollars, with no notice whatever of the title or claim now set up by the plaintiff in this case; and that afterwards, to wit, on the 16th day of June, A. D. 1875, the said city of San Antonio for the good and valuable consideration, to wit, that the United States of America would establish and keep the military headquarters of the United States Army in Texas on said premises, did convey the premises set out herein above to the defendant, the United States of America, for military and other purposes, the said United States of America then and there having no notice whatever of the title or claim here set up by plaintiff, and hence the defendants say that their vendor, the said city of San Antonio, Texas, is an innocent purchaser for a valuable consideration of the premises set out herein, and that defendants are such innocent purchasers through the said city of San Antonio, and of themselves, wherefore they claim their full protection as such purchasers, etc., etc., and put themselves upon the country.

J. G. BALLANCE,
Attorney for Defendants.
ANDREW J. EVANS,
U. S. Dist. Attorney for the United States of America.

And defendants say:

That on the 16th day of June, A. D. 1875, the defendant, the United States of America, acquired the title and right of possession to the premises set out above, and instantly went into actual possession thereof with her Army and soldiers, and commenced to improve and beautify the same as a part of her military headquarters in the State of Texas, and
6 from thence until now have actually occupied the said lands and premises, and have beautified and improved said premises, building houses, barracks, storehouses, stables, etc., of great value, say of the value of ($100,000.00) one hundred thousand dollars, and during all of such time, to wit, from the said 16th day of June, A. D. 1875, to the time of filing this suit the plaintiff in this suit and those under whom they hold stood by and witnessed the improvements and expenditure by defendants put upon said lands and premises without giving any notice of their claim or title thereto, and now for the first time set up their claim, wherefore defendants say that plaintiff, by her laches, has estopped herself and is estopped from the assertion of her title or claim, if she ever had any, and of this defendants put themselves upon the country.

J. G. BALLANCE,
For Defendants.
ANDREW J. EVANS,
U. S. District Attorney.

And specially pleading, the defendant saith that since June 16th, 1875, and until the filing of this suit, to wit, Feb. 23rd, 1889, the defendant, the United States of America, has been in the actual use and possession of all of the said premises herein described, using, cultivating, and enjoying the same, there being no taxes due thereon, and here interposes her plea of ten years' limitation and put' herself upon the country.

J. G. BALLANCE,
For Defendants.
ANDREW J. EVANS,
U. S. Attorney.

And pleading specially, defendants further say:

That the defendant, the United States of America, has had the actual and adverse possession of the said premises set out herein above, cultivating and using and enjoying the same and paying the taxes due thereon under deeds duly recorded for more than five years next preceding the filing of this suit, and here interposes her plea of the statute of limitation of five years and puts herself upon the country.
7

J. G. BALLANCE,
For Defendants.
ANDREW J. EVANS,
U. S. Attorney.

And further specially pleading, defendants say: That the defendant, the United States of America, have had the actual, peaceable, adverse possession of the premises set out in this pleading, using, cultivating, and enjoying the same, and paying the taxes due thereon, under title and color of title from and under the sovereignty of the soil down to the defendant,

the United States of America, duly registered, and here interposes her plea of the three years' statute of limitation and puts herself upon the country.

J. G. BALLANCE,
For Defendants.
ANDREW J. EVANS,
U. S. Attorney.

Defendants further say that they are informed and believe that the plaintiff in this case will attempt to set up title to the land set out in her complaint through a certain purchase deed to the same, purporting to have been made by Amanda J. Dignowity, as the agent and attorney of Anthony M. Dignowity, dated on or about May 9th, 1860, to the ancestor of the plaintiff, but never recorded; and defendants say that there exists no such valid deed, and if the plaintiff on trial in this case produces such a deed, then defendants charge that the same is a forgery and not a genuine instrument; and, further, defendants say that if ever any such deed as that set up by the plaintiff existed, then they charge the truth to be that said deed was without consideration, and that the said Duncan B. McMillan never did pay the purchase money named in said deed, to wit, the sum of one hundred dollars, but that he only agreed to do so at the time said deed was made, but always failed to do so during his life, and his heirs after his death did likewise, and thus long since forfeited all interest in said land.

J. G. BALLANCE,
Atty. for Defendants.
ANDREW J. EVANS,
U. S. Attorney.

8 And defendants further say that the United States of America have had adverse possession, in good faith, of the premises in controversy for at least one year next before the 23rd day of February, A. D. 1889, the commencement of this suit, and that the United States of America have made permanent and valuable improvements thereon during the time they were in possession thereof, to wit: Have built two houses, worth the sum of one thousand dollars each; cleared the same of brush, worth $100.00; fenced the same, worth $500.00; made sidewalks thereon, worth $500.00; and they pray the same be adjudged to them, etc., etc.

J. G. BALLANCE,
Attorney for Defendants.
ANDREW J. EVANS,
U. S. District Attorney.
HENRY TERRELL,
Ass't U. S. Attorney.

Filed October 4th, 1889.

GEO. R. DASHIELL,
Clk D. C. B. Co.

Order transferring cause to 45th district court.

MONDAY, *November 18th, A. D.* 1889.

MARY U. SCHWALBY ET AL.
vs.
DAVID S. STANLEY ET AL. } No. 4053.

It is ordered by the court that the above and foregoing numbered and styled causes be transferred, and the same are hereby transferred to the district court of the 45th judicial district of Texas.

MONDAY, *December 2nd, A. D.* 1889.

MARY U. SCHWALBY
vs.
DAVID S. STANLEY ET AL.

Plaintiff in this cause has leave to file 1st amended original and first supplemental petition, and leave is granted Jos. Spence, jr., to intervene.

9 *Plaintiffs' first amended original petition.*

In Bexar County district court, 45th district. To December term, 1889.

The STATE OF TEXAS,
County of Bexar:

MARY U. SCHWALBY ET AL.
vs.
DAVID S. STANLEY ET AL. } No. 191.

To the hon. district court of said county, 45th judicial district:

Your petitioner, Mary U. Schwalby, who is herein joined by J. A. Schwalby, her husband, having asked and obtained leave of court to file this, their first amended original petition, in lieu of their original petition filed on the 23rd day of February, A. D. 1889, complaining of David S. Stanley, William R. Gibson, Samuel T. Cushing, and J. C. Bailey, in an action of trespass to try title, respectfully shows:

That plaintiffs reside in the county of Grimes, State of Texas; that defendants reside in said county of Bexar; that heretofore, to wit, on the 1st day of February, A. D. 1889, your petitioner, Mary U. Schwalby, was lawfully seized and possessed of an undivided one-third interest in and to the certain real property hereinafter described and situated in said county of Bexar; that petitioner, Mary U. Schwalby, held and now holds said undivided one-third interest in said real property in fee simple, and that petitioners are entitled to possession to the whole of said property; that afterward, to wit, on the 2nd day of February, A. D. 1889, defendants, without any right or title to any portion of said property, unlawfully entered upon and dispos'ed petitioners of said premises and withhold from them the possession thereof; that the premises so entered upon and unlaw-

fully withheld from petitioners are described thus: "All that certain tract or parcel of land situate, lying and being in the city of San Antonio, county of Bexar, and State of Texas, described as follows, to wit:
10 Lot number one (1) in block number two (2), being a subdivision of original lot No. one (1) in range number four (4) in district No. 1, of the city tract, of the city of San Antonio, on the east side of the San Antonio River, according to the map and survey of said city, said subdivision being according to the plan thereof made for Anthony M. Dignowity by G. Freisleben, city surveyor of said city; said lot has a front of thirty-two varas on Grayson street and a depth of ninety varas.

Defendants being in court by process and answers duly filed, plaintiffs pray judgment for the recovery of the title to one-third of said premises and possession of the whole thereof; for costs of suit and for general relief.

GEO. C. ALTGELT,
Atty. for Plaintiffs.

Filed December 2nd, 1889.

GEO. R. DASHIELL,
Clk. D. C. B. Co.

Plaintiffs' first supplemental petition.

In Bexar County district court. December term, 1889. 45th judicial district.

MARY U. SCHWALBY ET AL.
vs.
DAVID S. STANLEY ET AL. } No. 191.

Now come the plaintiffs, Mary U. Schwalby and J. A. Schwalby, her husband, and with leave of the court had and obtained, file this, their first supplemental petition.

Thereupon plaintiffs except to the answer filed in this suit by J. G. Ballance, esq., and A. J. Evans, esq., U. S. attorney, western district of Texas, in so far as the same is filed by said attorneys for and in behalf of the United States of America, because they say:

1st. The said United States of America are not a party defendant to this suit, and that neither of said attorneys nor the Attorney-General of the United States has authority to submit for adjudication in the
11 courts of the State of Texas the rights of the said United States of America.

2nd. This court has no jurisdiction to determine the controversy and issues attempted to be pleaded by said officers in behalf of the United States of America, but that the same are cognizable exclusively in the courts of the United States.

3rd. That the matters pleaded by the said United States of America as an estoppel against plaintiffs are insufficient in law because the facts stated do not constitute an estoppel.

4th. That the matters pleaded by said United States of America under their several pleas of the statute of limitations of ten, five, and three years, constitute no defense to plaintiff's action because they say the United

States of America are neither bound by nor protected by the statute of limitations of the State of Texas; and because the plaintiffs could not, in any court, bring suit against said United States.

5th. That the suggestion of improvements alleged to have been made in good faith by the United States of America upon the land in controversy is insufficient in law because the grounds of said claim are not stated.

6th. Plaintiffs except to the sufficiency of all that portion of the answer of the United States of America, alleging an innocent purchase from the city of San Antonio by the United States aforesaid, because it does not appear therefrom that the consideration of said purchase was for a valuable consideration.

Plaintiffs pray for judgment of the court upon the sufficiency of said answer, in so far as the same is filed for the United States of America, and that the same may be stricken out for costs, &c.

GEO. C. ALTGELT,
Attorney for Plaintiff, Mary U. Schwalby, et al.

The plaintiffs, by way of replication to defendant's said answer, say that they deny all and singular the allegations therein contained.

12 Plaintiffs further show that the plaintiff, Mary U. Schwalby is now, and ever since the 18th day of January, 1871, was a married woman, and the wife of her co-plaintiff, J. A. Schwalby.

Plaintiffs aver that on said 18th day of January, A. D. 1871, and long prior to the time that defendant's adverse possession first commenced, the said Mary U. Schwalby was lawfully married to J. A. Schwalby, her husband and co-plaintiff, and ever since that time continued to be a married woman as aforesaid.

Wherefore, plaintiffs say that defendant's pleas of the statutes of limitation ought not to avail them. Plaintiffs pray judgment, &c.

GEO. C. ALTGELT,
Attorney for Plaintiff.

Filed December 2nd, 1889.

GEO. R. DASHIELL,
Clk D. C. B. Co.

Petition of Joseph Spence, jr., for intervention.

In Bexar County district court. December term, 1889. 45th judicial district of Texas.

THE STATE OF TEXAS,
County of Bexar, ss:

MARY U. SCHWALBY ET AL,
vs.
DAVID S. STANLEY ET AL. } No. 191.

To the Hon. district court of said County of Bexar, 45th judicial district:

And now comes Joseph Spence, jr., and with the leave of the court in this behalf had and obtained, files this, his original petition in intervention in this suit.

And thereupon complaining of defendants, David S. Stanley, William R. Gibson, Samuel T. Cushing, and J. C. Bailey, but not resisting the relief prayed for by plaintiff, Mary U. Schwalby, the intervenor shows: That he resides in Tom Green County, Texas. That all of said defendants reside in Bexar County, Texas. That your petitioner is the owner in fee of one undivided one-third interest in and to the
13 lands and tenements in controversy in this suit, and described in plaintiff's petition aforesaid. That heretofore, to wit: On the 26th day of March, A. D. 1889, petitioner became and was lawfully seized and possessed of said undivided one-third interest of said real property, holding the same in fee simple, and was entitled to the possession of the whole of said property, as against said defendants.

That afterwards, to wit: on the 27th day of March, A. D. 1889, said defendants, without any right or title to any portion of said premises, unlawfully entered upon and dispossessed petitioner of said premises and withhold from him the possession thereof.

The said premises so unlawfully entered upon by defendants and withheld from petitioner are described as follows, to wit: "All that certain tract or parcel of land situate, lying and being in the city of San Antonio, in the county of Bexar and State of Texas, described as follows, to wit: Lot number one (1), in block No. two (2), being a subdivision of original lot number one in range No. four (4), in district No. one (1) of the city tract of the city of San Antonio, on the east side of the San Antonio River, according the map and survey of said city; said subdivision being according to the plan thereof made for Anthony M. Dignowity by G. Freisleben, city surveyor of said city; said lot has a front of thirty-two varas on Grayson street and a depth of ninety varas.

Defendants being in court by answers and process, intervenor prays judgment for the recovery of the title to one-third interest in said premises as against defendants, but jointly with plaintiff for costs of suit and general relief.

GEO. C. ALTGELT,
Attorney for Intervenor, Jos. Spence, Jr.

Filed December 2nd, 1889.

GEO. R. DASHIELL,
Cl'k D. C. B. Co.

Order overruling defendants' exceptions. *Monday, December 9th, A. D.* 1889.

14 MARY U. SCHWALBY ET AL., *vs.* DAVID S. STANLEY ET AL. } No. 191.

This day, December 9th, 1889, came on to be heard the several general and special demurrers of defendants in this case filed, the same having been argued and submitted to the court on a previous day of the term, and it being the opinion of the court that the defendant, the United States, can not set up or plead the statutes of limitation of three, five, or ten years, it is ordered by the court that the said pleas of the United States of the statutes of limitation of three, five, and ten years, be stricken out; to

which ruling of the court the United States, by her attorney, in open court excepts and prays her exception be entered of record, which is done, and it further being the opinion of the court that the plea of claim for valuable improvements is not sufficiently plead, it is ordered that the same be stricken out. And it further the opinion of the court that each and all the general and special demurrers of the plaintiffs not specified are not valid, and it is ordered that the same be overruled; to which ruling of the court the plaintiffs in open court excepts and pray their exception be noted in the record, which is done, and it is ordered by the court that defendants or either of them have leave to amend their pleadings.

Defendants' first trial amendment.

In the honorable district court, 45th judicial district.

MARY U. SCHWALBY ET AL.,
vs.
DAVID S. STANLEY ET AL. } No. 191.

Now come the defendants (the court having sustained plaintiffs' demurrer to defendants' plea of valuable improvements in good faith, and
15 claiming pay therefor, with leave of the court), files this, their trial amendment, and say:

That the defendant, the United States of America, has had adverse possession in good faith under title duly recorded of the premises in controversy in this case, to wit: Lot No. (1) one, in block No. (2) two, being a subdivision of original lot No. (1) one, in range No. four (4), in district No. (1) one of the city tract of the city of San Antonio, Texas, on the east side of the San Antonio River, for at least one year next before the 23rd day of February, 1887, the date of this suit, and that the United States have made valuable and permanent improvements thereon, to wit: Have erected and built on said premises during the time they have been in possession, as follows, to wit:

Two houses, wooden, each $500.00	$1,000.00
One servant's house, of value	300.00
Three hundred and twenty feet of fence, at 50 cents	160.00
One shed	20.00
One other shed	100.00
Improvements, grading, and filling	100.00
Total	$1,935.00

and in case of eviction in this case, defendants stay judgment for the value of said improvements, &c.

BALLANCE & EVANS,
For Defendants.

Filed March 7th, 1890.

GEO. R. DASHIELL,
Clk. D. C. B. Co.

Defendants' second trial amendment.

In the honorable district court of Bexar County, 45th judicial district.

MARY U. SCHWALBY ET AL.
vs.
DAVID S. STANLEY ET AL. } No. 191.

Now comes the defendant, and with leave of the court files their trial amendment No. 2, and the court having sustained plaintiffs' demurrer to defendants' plea of valuable improvements in good faith, and having held their first trial amendment to be insufficient, the defendants here now say and plead that the United States of America has had adverse possession in good faith under title duly recorded of the premises in controversy in this case, to wit: Lot No. 1, in block No. 2, being a subdivision of the original lot No. 1, in range No. 4, district No. 1, of the city tract of the city of San Antonio, Texas, and on the east side of the San Antonio River, for at least one year next before the 23rd day of February, 1887, the date of this suit, and that the United States have made valuable and permanent improvements thereon, to wit: Have erected and built on said premises during the time they have been in possession, as follows:

16

Two woolen houses, at $500.00 each	$1,000.00
One (1) servant's house, value	300.00
Three hundred and seventy (370) feet of fence, at 50 cents	185.00
One (1) s ed	250.00
One (1) other shed	100.00

And further pleading, in 1875, the United States of America being in need of ground for a military reservation, did, in good faith and without any notice whatever of any adverse claim or title or right of possession, take from the city of San Antonio, Texas, a warranty deed to the premises set out above, and this she did after a careful examination of the county records of Bexar County, Texas, and finding no adverse claim or title thereto on record. That when the United States made the improvements above set out, she, her agents, employees, and servants had no knowledge whatever from any source, or suspicion that any adverse title to that held by the city of San Antonio and herself existed in anyone against said city or herself. That had the defendant known or had a suspicion of the existence of any adverse title, claim, or right, she would not have purchased the above land or made the improvements thereon.

17 The defendants aver that at the time she bought the land and made the improvements she caused the title of the city of San Antonio to be thoroughly examined back to the sovereignty of the soil and found no defect whatever therein, and that upon these grounds she purchased the land at a cost of $20,000.00 and erected all the improvements above thereon, expecting to use and enjoy them forever, and now here plead that the said improvements were made in good faith, and claims judgment for value thereof in case of eviction, as in duty bound.

BALLANCE & EVANS,
Att'ys for Defendants.

Filed March 7th, 1890.

GEO. R. DASHIELL,
Clk D. C. B. Co.
By M. YTURRI, Jr.,
Deputy.

Agreement.

In the district court of Bexar County, Texas.

MARY U. SCHWALBY ET AL.
vs.
DAVID S. STANLEY ET AL. } No. 4053.

In the above cause, to save costs and expedite trial, it is mutually admitted and agreed:

1st. That Anthony M. Dignowity, deceased, is the common source of title through whom each party claims.

2nd. That each party may read in evidence on the trial hereof any duly recorded instrument of title from the records of the county clerk of Bexar County, Texas, without getting certified copies, but in case of appeal or writ of error to appellate court, a certified copy must go into the record. Affidavits of law of originals is also waived.

3rd. All objections to the manner and form of taking and certifying the deposition of Mrs. Mary U. Schwalby is hereby waived.

J. G. BALLANCE,
A. J. EVANS, *U. S. Att'y,*
Attorneys for Defendants.
GEO. C. ALTGELT,
Attorney for Pl'tffs.

18 Filed March 7th, 1890.

GEO. R. DASHIELL,
Cl'k D. C. B. Co.,
By M. YTURRI, Jr.,
Deputy.

Bill of exceptions.

In the honorable district court of Bexar County, Texas, 45th judicial district.

MARY U. SCHWALBY ET AL.
vs.
D. S. STANLEY ET AL. } No. 4053.

Be it remembered on the trial of this case that one Joseph Spence, jr., who claimed the right to intervene in this case, moved the court to admit in evidence to the court a certain deed from one D. W. McMillan to him, the said Joseph Spence, jr., the lot or tract of land described in the plaintiff's, Mary U. Schwalby, original petitioner, executed on the 26th day of March, 1889, and recorded upon the same day, to the admission of which in evidence the defendants in open court by their attorneys excepted.

Because the said deed if admitted in evidence showed that whatever right or title the said Joseph Spence, jr., have under said deed was acquired after the filing of this suit, which was February 23rd, 1889, and D. W. McMillan, from whom the deed purports to come, was never a party to this suit, and

Because the said Joseph Spence had no interest whatever in this case at the time the suit was filed, and therefore cannot be heard in this proceeding to set up title after suit filed, and from a person not a party to the suit, which exceptions the court overruled and permitted the aforesaid deed to be read in evidence and considered over the exception by the defendants, and to which ruling of the court the defendants, by their attorneys, except and tender this their bill of exceptions to the court and pray that the same be allowed, signed, and filed.

BALLANCE & EVANS,
Attorneys for Deft.

Filed March 24th, 1890.

W. W. KING,
District Judge.
GEO. R. DASHIELL,
Clk. D. C. B. Co.

19 *Judgment of the court.*

MONDAY, *March 24th, A. D.* 1890.

MARY U. SCHWALBY ET AL.
vs.
DAVID S. STANLEY ET AL. } No. 191.

Be it remembered that upon this 24th day of March, A. D. 1890, this cause coming on to be heard, there came the plaintiffs, Mary U. Schwalby and J. A. Schwalby, her husband, by their attorneys; the intervenor, Joseph Spence, jr., by his attorneys; the defendants, David S. Stanley, William R. Gibson, Samuel T. Cushing, and J. C. Bailey, by their attorneys, A. J. Evans, esq., and Captain J. G. Ballance, and the United States of America, voluntarily making herself a party defendant herein, and appearing by A. J. Evans, esq., United States district attorney for the western district of Texas, and all the said parties submit the matters in controversy as well of law as of fact to the court.

Whereupon, after hearing the pleadings read, the evidence adduced, and argument of counsel thereon, it was the opinion of the court that the law and the facts are with the said plaintiffs and intervenor. It is accordingly adjudged that the plaintiff, Mary U. Schwalby, joined by J. A. Schwalby, her husband, and the intervenor, Joseph Spence, jr., do have and recover of and from the said defendants, David S. Stanley, William R. Gibson, Samuel T. Cushing, and J. C. Bailey, and the United States of America, the two-thirds of the title of the land sued for and possession of the whole of said lands described thus:

All that certain tract or parcel of land situate, lying, and being in the city of San Antonio, in the county of Bexar and State of Texas, described thus:

Lot number one (1), in block number two (2), being a subdivision of original lot number one (1), in range number four (4), in
20 district number one (1), in the city tract of the city of San Antonio, on the east side of the San Antonio River, according to the map and

survey of said city, said subdivision being according to the plan thereof made for Anthony M. Dignowity by G. Freisleben, city surveyor of said city. Said lot has a front of thirty-two veras on Grayson street and a depth of ninety veras.

It is further adjudged that the said defendants named pay the costs in this behalf incurred and that execution issue.

It is further adjudged that a writ of possession do issue upon this judgment placing the said plaintiff and intervenor in joint possession of said premises, subject, however, to the conditions hereinafter named.

It is considered by the court that the defendant, the United States of America, are entitled to the value of the improvements made by them in good faith, and that such improvements are worth the sum of seventeen hundred and twenty-one dollars.

It is considered by the court that the value of the use and occupation of said premises by said defendant, the United States of America, amounts to two hundred dollars.

It is considered by the court that the value of the premises recovered is twenty-five hundred dollars.

Wherefore it is adjudged by the court that said defendant, the United States of America, is entitled to recover the excess of the value of such improvements over the value of the use and occupation aforesaid and amounting to fifteen hundred and twenty-one dollars. It is accordingly adjudged that no writ of possession shall be issued for the term of one year after the date of this judgment unless said plaintiff and intervenor, or either of them, shall pay to the clerk of this court for said defendant, the United States of America, the aforesaid amount of fifteen hundred and twenty-one dollars, with interest thereon from this day at the rate
21 of eight per cent per annum.

If the said plaintiff and intervenor shall neglect for the term of one year to pay over the amount of said judgment in favor of said defendant, with interest thereon, as directed, and the defendant shall, within six months after the expiration of said year, pay to the clerk of the court, for said plaintiff and intervenor, the value of said lands, to wit, the sum of two thousand five hundred dollars; then the said plaintiff and intervenor shall be forever barred of their writ of possesion, or from ever having or maintaining any action whatever against said defendant for the said lands and tenements.

If the said defendant, the United States of America, or their legal representatives, shall not, within the six months aforesaid, pay over to the clerk, for the plaintiff, the said estimated value of the land, as hereinbefore directed, then the said plaintiff and intervenor may sue out a writ of possession as in ordinary cases, free and discharged from the foregoing conditions.

And thereupon, upon the announcement of said judgment by the court, all parties, to wit, plaintiff, intervenor, and all defendants excepted to said judgment, and in open court gave due notice of appeal.

Statement of facts.

In Bexar County district court, 45th judicial district, March, 1890.

MARY U. SCHWALBY ET AL.
vs.
DAVID S. STANLEY ET AL. } No. 191.

Be it remembered that upon the trial of the above-entitled cause the following evidence was adduced:

Plaintiffs' and intervenor's evidence.

22 Plaintiff and intervenor read in evidence a stipulation in writing, signed by counsel, wherein the parties agreed that Anthony M. Dignowity is the common source of title under whom all parties hereto claim the land in controversy.

2. Plaintiff and intervenor read in evidence a legally sufficient power of attorney from said Anthony M. Dignowity to Amanda J. Dignowity, his wife, dated September 13th, 1858, recorded in Bexar County, November 16th, 1858, which power of attorney gave said Amanda J. Dignowity full power to convey real estate and to deliver deeds therefor, the power of attorney being general.

3. Plaintiff and intervenor read in evidence a general warranty deed to the land in controversy and described in their pleadings, from Anthony M. Dignowity, acting by Amanda J. Dignowity, to one Duncan B. McMillan, which deed was dated May 9th, 1860, and duly acknowledged same day before W. H. Cleveland, notary public, Bexar County, and again duly acknowledged on December 10th, 1889, before W. H. Huston, notary public, Bexar County, Texas. The aforesaid deed recites a consideration of one hundred dollars "in hand paid, receipt whereof is acknowledged," and is in the form of a statutory warranty deed. The aforesaid deed was filed for record on the 30th day of September, A. D. 1889, and duly recorded on the first day of October, 1889.

4. Plaintiff and intervenor read in evidence the deposition of the plaintiff, MARY U. SCHWALBY, taken April 19th, 1889, and in substance as follows:

My name is Mary Uran Schwalby. I am forty years old and live near Iola, in Grimes County, Texas. I knew Duncan B. McMillan. I knew him both in Louisiana and in Texas from my earliest recollection. I am the daughter of Duncan B. McMillan, who was a married man. Duncan B. McMillan was married to Pumelia Hart, on the 5th day of February, 1847, in Jasper County, Texas. I am in possession of the
23 family Bible in which are recorded the marriages and deaths of my father, Duncan B. McMillan's family. Duncan B. McMillan and his wife had five children, viz, Mary Uran McMillan, who was born on the 11th day of September, 1848; Duncan Wynn McMillan, who was born on the 2nd day of November, 1850; Saint McMillan, who was born October 12th, 1852; Sarah McMillan, who was born on the 3rd day of August, 1854; Terrissa McMillan, who was born on the 6th day of April, 1857.

Duncan B. McMillan is dead; he died in DeSoto Parish, Louisiana, the 5th day of February, 1865. Permelia McMillan, wife of D. B. McMillan, is dead; she died on the 4th day of July, 1860, in DeSoto Parish, La. There were three children living at the time of Duncan B. McMillan's death. Terrissa McMillan died on the 14th day of December, 1858; Saint McMillan died on the 10th day of October, 1860; Sarah Neely died on the 17th day of August, 1878. There were four daughters, Mary Ulan McMillan, Saint McMillan, Sarah McMillan, and Terrissa McMillan. Two of the daughters of Duncan B. McMillan and wife were married. Mary Uran McMillan was married to a J. A. Schwalby on the 18th day of January, 1871, and Sarah McMillan was married to J. A. Neely on the 14th day of February, 1875.

I am still married; my husband, J. A. Schwalby, is still living. I know D. W. McMillan; he is my brother. D. W. McMillan lives at or near Devine, Medina County, Texas. I remember that my father, Duncan B. McMillan, went to Western Texas in the year 1860; he went to San Antonio in that year. Duncan B. McMillan lived in the State of Louisiana, in DeSoto Parish, nearly thirty miles SW. of Shreveport, La. Mrs. Sarah Neely was the mother of two children that are still living.

5. Plaintiff and intervenor, after proving the handwriting of G. Freisleben, city surveyor, and introduced in evidence original plot as follows, to wit:

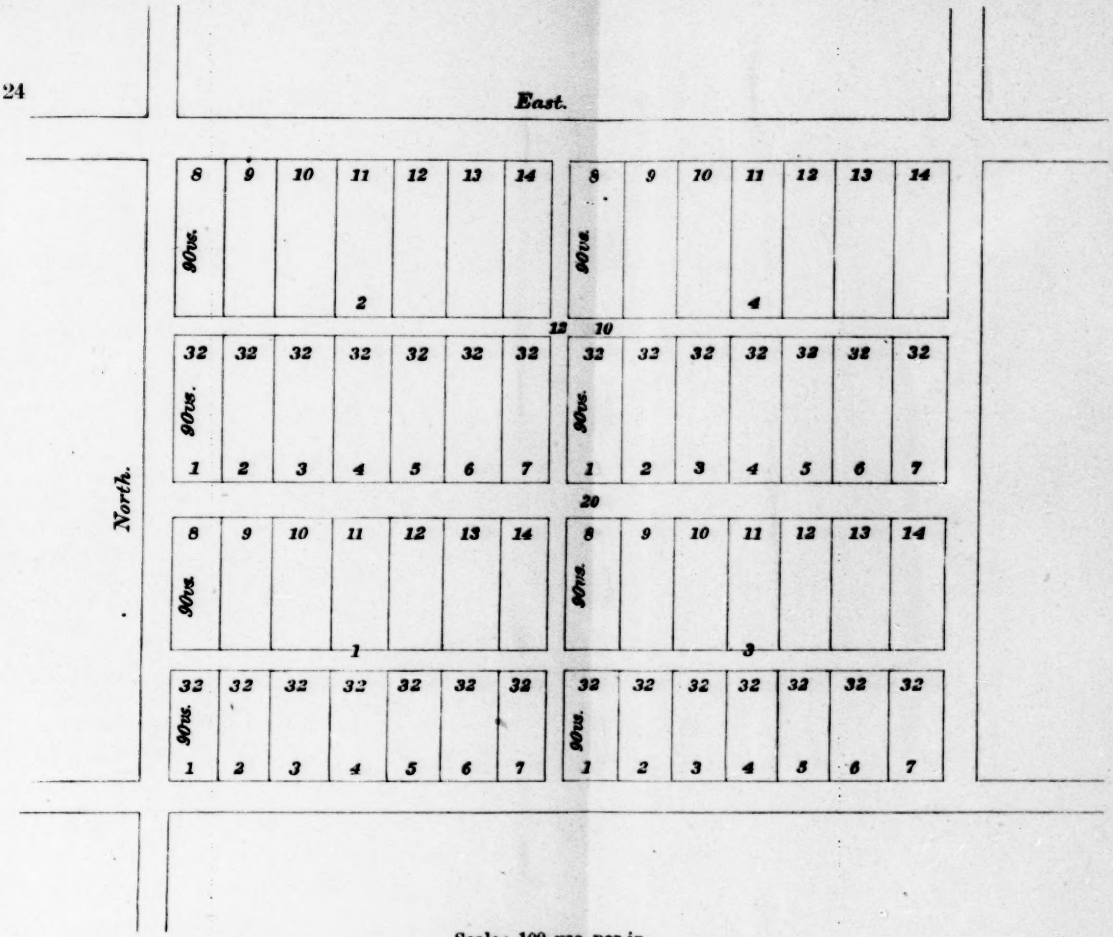
6. Plaintiff and interventor called the defendant, Gen. DAVID S. STANLEY, who testified as follows:

I am one of the defendants in this suit. I know the land sued for; it is on the corner of Pine and Grayson streets. Myself and the other defendants were in possession of the lot when this suit was brought.

I am a brigadier-general in the United States Army; my co-defendants are officers in the United States Army. We took, held, and hold such possession as officers of the U. S. Army.

Cross-examination:

25 The Government of the United States took actual possession of the land in controversy in the year 1882. The land sued for is part of the military reservation of the United States of America at San Antonio. We hold possession under the United States of America. According to my understanding, the United States first took possession of this lot in the year 1875 or 1876; it was then open prairie. We do not claim title to the land in our own right, but hold it for the United States. The United States have made the following improvements upon the lot in controversy, before the institution of this suit to wit: The ground has been cleared off, two frame houses have been built upon the land. I can not say what they are worth, they cost from three hundred to five hundred dollars each; one servant's house has been built upon the land which cost from two to three hundred dollars. I do not know what it is worth. There are 370 feet of fence upon the land which are worth and would cost $0.50 a foot. There are two sheds upon the land worth from thirty to forty dollars each. The grading and filling of the lot would cost one hundred dollars. These improvements were made since the year 1881; before, that lot was open prairie. I never heard of a claim against this land until the commence-



Scale: 100 vas. per in.
Var., 9° 45′ east.

Plat of the survey and division of lot No. one (1), in range 4, dist. 1, belonging to A. M. Dignowity.

G. FREISLEBEN,
City Sr.

SAN ANTONIO, *April 16th*, 1860.

, W.

7431—To face page 16.

ment of this suit. My understanding has always been that this land was donated by the city of San Antonio to the United States. If the United States paid the city anything for it, I know nothing about it. The lot without improvements is worth twenty-five hundred dollars.

Re-examination by plaintiff and intervenor:

I know the general locality of the disputed land. I never saw it measured out, nor do I know its exact lines. I will not swear that the lot in controversy was increased in value one cent by reason of the improvements upon it. On the contrary, if a man wanted the lot for
26 a residence, the improvements now upon it, would be an incumbrance and would be worth next to nothing. When I speak of value and cost of the houses I mean what it would cost the Government to replace them, considering the cost of lumber and labor. The improvements are all made of lumber, not of stone or brick. The rent of the lot without improvements would be worth very little if anything. I can not say that the rent of the naked lot would be worth five dollars a month. Five dollars per month for the naked lot would be the extreme limit. The lot with improvements might be worth fifteen dollars rent a month. The houses mentioned by me as being upon the lot are not wholly upon the lot, but stand about one-third upon other land that the Government acquired from the city. These houses could not be removed without total loss; that is, if the two-thirds upon this lot were taken down the remaining one-third of the houses would be valueless, except as old material, which is worth next to nothing. Some of the 370 feet of fence is not upon the lot but upon ground formerly known as Pine street, which the Government acquired from the city."

The intervenor introduced in evidence a deed of conveyance dated the 26th day of March, 1889, duly acknowledged the same day, filed for record March 29th, 1889, whereby D. W. McMillan, of Devine, Medina County, Texas, conveyed to Joseph Spence, jr., the intervenor, the land in controversy. This deed describes the land as the same is given in plaintiff's and intervenor's pleadings, and recites that said lot was conveyed to Duncan B. McMillan, the deceased father of the vendor, by Anthony M. Dignowity by deed dated the ninth day of May, 1860.

Plaintiff and intervenor rested their cause.

Defendant's evidence.

Defendants read in evidence the aforesaid stipulation in writing signed by counsel, wherein the parties agreed that Anthony M.
27 Dignowity is the common source of title, under whom all parties hereto claim the land in controversy.

Defendants read in evidence the last will and testament of Anthony M. Dignowity, deceased, and the probate thereof in Bexar County, Texas, said will bearing date the 16th November, A. D. 1870, and the probate thereof the 22nd day of April, A. D. 1875, and in which he bequeaths all his estate and all his interest in the community estate of himself and his wife, Amanda J. Dignowity (all of his estate being community property), to the said Amanda J. Dignowity, and making her independent executrix of his said last will, with plenary powers of sale and disposition of all his property, and requiring no bond or inventory of property.

Defendants then read in evidence to the court a deed from Amanda J. Dignowity, in her own right and as independent executrix of the last will and testament of Anthony M. Dignowity, deceased, to the city of San Antonio, Texas, of date 1st day of May, A. D. 1875, and in which said deed, after specifying certain other lots of land therein sold, provides as follows:

"Also a release and quit claim to said city of San Antonio all my right, title, and interest in lot No. one (1) in same block No. (2) two, known as the McMillan lot. Also all my right, title, and interest to said block No. (2) two. To have and to hold all and singular the premises above mentioned, with the rights, members, hereditaments to the same belonging, or in anywise incident or pertaining, unto the said city of San Antonio and its assigns forever. And I hereby bind myself as a party to this instrument, and, so far as I am executrix as aforesaid and by law authorized, bind all the heirs, devisees, legatees, distributees, and personal representatives of said estate to warrant and forever defend all and singular the said premises unto the said city of San Antonio and its assigns against any per-
28 son whomsoever lawfully claiming or to claim the same or any part thereof by, in, or through Anthony M. Dignwoity, deceased, or the estate of said Anthony M. Dignowity, deceased, and none other, &c., &c."

The consideration of the above deed is $1,500.00 for all the lots conveyed therin, to wit: Lots 8 and 9 and 10, in block No. 2, and lot one (1) in same block, and the said deed was duly recorded in Bexar County land records on the 1st day of June, A. D. 1875.

Defendants then read to the court in evidence a warranty deed from the city of San Antonio, Texas, dated 16th day of June, A. D. 1875, and duly recorded in the land records of Bexar County, Texas, on the 21st day of October, 1875, and in which the said city of San Antonio "for and in consideration of one dollar paid to the city of San Antonio by the said Government (of the United States), the receipt whereof is hereby acknowledged, and for divers other good and sufficient considerations thereunto moving," conveys to the Government of the United States of America, for military purposes, many lots and block 2 of said estate and among which are lots No. (1) one and No. (8) eight and No. (9) nine and No. (10) ten, in block No. (2) two, subdivision of lot No. 1, the said lot No. (1), one above being the lot in controversy in this suit, and the same conveyed to the city as set out in deed to said city of San Antonio from Mrs. Amanda J. Dignowity, set out above.

Defendants then read in evidence to the court the deposition of Mrs. AMANDA J. DIGNOWITY, taken on motion of the plaintiffs in this case, but not read by them, who swears as follows, in deposition of date 23rd day of July, 1889:

My name is Amanda J. Dignowity. I reside in the city of San Antonio, Texas. I have resided in Bexar County since about the year 1846. I knew Anthony M. Dignowity since 1840. Anthony M. Dignowity is dead; he died in the year 1875 at San Antonio, Texas. He was my husband. I am the Amanda J. Dignowity who acted as executrix
29 of the last will of Anthony M. Dignowity, and I was his wife.

I believe lot 1, block 2, out of original lot 1, range 4, district 1, to be a portion of the property now known as Government Hill and bought of me by the city through its mayor, James H. French. I have examined the certified copy of deed purporting to be a deed from me—for my-

self and as executrix of the last will of Anthony M. Dignowity—deed to the city of San Antonio, dated May 1st, 1875. Lot 1, in block 2, named in that deed was called by me the McMillan lot, because as it was the habit of my husband during his lifetime whenever he sold a city lot to mark the name of the purchaser in pencil on the map, and when the lot was paid for to write the name in ink. I presume I found this lot marked in the name of McMillan in pencil, and therefore called it the McMillan lot. This is the only explanation I am now able to give. I can not now remember the price or value of the three lots, 8, 9, and 10, at the time of the sale to the city. I made my deed to the city a quitclaim deed, so far as lot 1 in same block is concerned, for the reasons mentioned above. I can imagine no other reason. I must have known in some way that at the time the lot had been sold and a payment made on it, and I know of no other way I should have known of it, except as stated above. I can not now tell how much of the consideration in the deed was paid me by the city for the McMillan lot, or lot 1, in block 2. I negotiated the sale to the city of San Antonio with James H. French, mayor, James P. Newcomb, and Sam S. Smith, and I think the trade was completed by Gen'l W. H. Young, who received the money for me. I have no recollection of a conversation with any one of them with special reference to lot 1, block 2, the lot in controversy. I do not know the relative value of lots 8, 9, and 10 as compared with value of said lot 1, block 2, nor did I know at that time.

30 Cross-examination:

I held a power of attorney from Anthony M. Dignowity with general power to sell his real and personal estate about the year 1859 or 1860. I do not remember the date of this power of attorney, but I believe it is of record; I never held but the one. I never knew Duncan B. McMillan, or if I did I have no recollection of him. If I ever had any business transactions with him I have entirely forgotten them. I may have, in the year 1860, had business with Duncan B. McMillan relating to the sale to him of a lot of land in San Antonio, but if so, I have entirely forgotten it. I have no recollection of ever making a deed to Duncan B. McMillan of lot one (1) in block two (2), subdivision of the original lot No. 1 (one), range 4 (four), district 1 (one), though I may have done so. If such a deed was made by me 39 years ago, I do not see why it was not recorded, unless perhaps because the full purchase money had not been paid. As all my papers were destroyed by fire during the war, I have no means of ascertaining the truth of the matter. I do not believe Duncan B. McMillan did pay cash in hand, though I have no recollection of the transaction at all.

Anthony M. Dignowity lived until the 22d day of April, 1875, which is about fifteen years ago. I do not know who was in possession of the lot in controversy from 1860 to the time of his death, but believe it was unoccupied. I do not know that it was claimed by anyone but Anthony M. Dignowity. I paid the taxes on them during that time, from 1860 to the death of my husband. I never took actual possession of the lot, but continued to pay the taxes until it was sold to the city. I never had said lot in actual possession and never had a tenant on it. There was a butcher pen in the neighborhood, but it was on a lot purchased by the butcher, and afterwards sold by him to the Government. I think the butcher's name was

Lang. He purchased his lot from my husband long before 1860.
31 I think it was the first lot sold out of the tract. Neither Duncan B. McMillan, nor anyone for him, nor any of his heirs, ever claimed an interest in the lot in suit in this case, from 1860 to 1875, to my knowledge. When I sold the lot in controversy to the city of San Antonio I acted in good faith. I believed for some reason that Duncan B. McMillan had some claim on the lot or I should not have specially quitclaimed it to the city, and I believe as I have before stated, that my knowledge of this claim was derived from seeing his name on the map in pencil showing that he had made a partial payment for the lot, and when I sold to the city I sold subject to this claim, if any existed, that is, I sold only my interest in the lot. It is possible that at the time I knew just what the claim was, but if I did it has passed entirely from my recollection. I did not write the deed to the city. I never wrote a deed in my life. I signed it myself. I can not say whether McMillan had ever tried to buy the lot in controversy and failed to pay or not, but I believe he had made one payment and failed to pay the balance. I usually write my name Amanda J. Dignowity, but when requested to do so, as I was when I made the deed to the city, I write my full middle name. I have done so on several other occasions.

Defendants then read in evidence to the court the deposition of the same witness, Mrs. AMANDA J. DIGNOWITY, taken on motion of the defendants of date 31st day of December, A. D. 1889, as follows:

I am in my seventieth year, and reside in San Antonio, Texas. I was Anthony M. Dignowity's wife. Yes, I had a power of attorney from Anthony M. Dignowity to sell lands of his, dated on or about the year 1858. I never had but one power of attorney from him. When I gave my deposition to Capt. Huston last summer I stated then that I never knew a man by the name of Duncan B. McMillan, but the questions then propounded to me put me to thinking, and I afterwards recollected
32 and from some old papers my memory was refreshed on the subject so that now I answer of a D. McMillan coming to my house with his wife. I saw him only once, and that was during the early part of the Confederate war; he was then returning to his home in Louisiana. I have seen the original of the deed from me to D. B. McMillan, dated May 9th, 1860, and made under a power of attorney given to me by Anthony M. Dignowity, and have sworn to my signature and know it to have been executed at that time. I was shown the deed by Capt. Wm. Huston. My daughter, Mrs. J. T. Hambleton, was present and no one else. I have never seen it but that one time since it was executed by me until to-day. I carefully examined it and it is a genuine deed. I do not know why said deed was never recorded until a few months ago. I don't know whether I ever delivered possession of the lot in controversy to Duncan B. McMillan, or his agent for him, formally or not. I paid taxes on the land until it was sold subsequently. I don't recollect of receiving but fifty (50) dollars on the transaction and think that was paid before the date of the deed. I don't recollect anything more than that I was paid fifty dollars on the trade and I executed the deed and acknowledged it before Mr. Cleveland and left it with him. The deed is the same shown me to-day and marked Exhibit A of this deposition.

Cross-examination:

I have not seen Duncan B. McMillan since 1860. He was then on his way home to Louisiana. I positively know that the deed from me as attorney in fact to Duncan B. McMillan conveying the lot in controversy in this suit is a true and genuine instrument. It is not a forgery, it is a true and genuine deed. I do remember W. H. Cleveland. He was a lawyer in good standing about the year 1860. He did, at times, attend to business both for myself and husband. I have owned and sold considerable real estate in Texas, and still own property, and have experience
33 in dealing in lands and city lots. The deed from me to McMillan recites a consideration of $100.00, but I do not recollect of receiving but fifty. I received fifty dollars, as before stated; my husband never received a cent. I do not know anything about what other persons may have received. I know nothing of any note. I don't know anything about the money having been paid to Cleveland. If it was, I don't know anything about it. My recollection as to the real consideration of the deed is not clear and distinct. I have given the statement about it as correctly as I can remember. I had forgotten the consideration named in the deed, but after seeing it recited in the deed, remember that I received only fifty dollars. When I made the quitclaim deed to the city for this same lot I did not advise the parties who negotiated with me that said lot was the McMillan lot, and that I therefore could make only a quitclaim deed. Having paid the taxes on it for so many years, I considered I had an equity on it.

Defendants read in evidence to the court the deposition of one D. W. McMillan, taken on motion of plaintiff and intervenor, but not read by them, who swears as follows:

My name is Duncan Wunne McMillan. My place of residence is Devine, Medina County, Texas. I know Mary U. Schwalby, have known her about twenty-five years. She is my sister. I did know Duncan B. McMillan; he is my father. Duncan B. McMillan is dead; he died at Keachie, Louisiana, in 1865. Duncan B. McMillan lived in De Soto Parish, La., and Grimes County, Texas. He was a married man. He married Parmelia Hart. I don't remember the date of the marriage. Duncan B. McMillan had five children by his wife; Mary U. McMillan, (girl), whose birthday I do not remember; Saint McMillan (girl), whose birthday I do not remember; Sallie McMillan (girl), whose birthday I do not remember; Terrissa McMillan (girl), whose birthday I do not remember; Duncan Wynne McMillan (boy), born November 2nd, 1850. The wide of Duncan B. McMillan is dead; she died
34 about the year 1863. Three of Duncan B. McMillan's children survived him—Sallie Nealy, who died at Keachie, La., Mary U. Schwalby, living, who resides at Iola, Grimes County, Texas, and Duncan Wynne, living, who resides at Devine, Medina County, Texas. Two of Duncan B. McMillan's children died before he died—their names are Saint and Terrissa (girls). Two of Duncan B. McMillan's girls were married—one, Mary U. McMillan, married J. A. Schwalby about the year 1887; do not remember exactly. Sallie McMillan married J. A. Neely in 1876, as well as I remember. The above is about all I know, only I heard my father say when he left Louisiana that he would probably move to San Antonio, where he had a lot, and live on it."

J. H. FRENCH, for defendants, said:

I was mayor of the city of San Antonio in 1875, at the time the city purchased the property from Mrs. Dignowity. The city paid the consideration $ to Mrs. Dignowity in April, 1877. The Government buildings, the officers' quarters, were placed upon the Dignowity property. The city had the title examined by A. J. Evans.

Cross-examined:

When the city purchased from Mrs. Dignowity and paid the money the city had notice of this claim—that is, the claim of D. B. McMillan. We had this notice from Mrs. A. J. Dignowity. Mrs. Dignowity refused to give a warranty deed to the lot in controversy. The report of the special committee to the city council, read by counsel, and to be found hereinafter, refers to this property. I, as mayor of the city, had notice of the McMillan claim at the time the city purchased. There was no consideration paid direct from the Government to the city for the property. It was a donation from the city to the Government.

Re-examined:

City never received any consideration direct from the Govern-
35 ment for the conveyance, but by reason of the establishment of the military headquarters here the city has received a thousandfold benefit on the consideration paid by her to Mrs. Dignowity.

A. J. EVANS, for the defendants, said:

I, as United States district attorney for the western district of Texas, in 1875, made an examination of the title to the lot in controversy and traced the title back to the case of Lewis vs. the City of San Antonio. I examined the records of deeds for Bexar County, Texas, and did not find any deed of record from Dignowity, and after I made the examination I believed the title was good. I so advised the Department at Washington, and upon my advice the Government took the deed from the city in good faith.

Cross-examined:

I made the examination of the title as the U. S. attorney, and advised that the title was good. I saw the deed from Mrs. Dignowity, as executrix, to the city of San Antonio; read it, and had notice of all its recitals. I had information of the sale to Duncan B. McMillan, but I satisfied myself that he had never fully paid the purchase money. (This question was asked the witness: "Mr. Evans, when you read the deed from Mrs. Dignowity to the city of San Antonio and saw there the lot in dispute was quitclaimed and described as being known 'as the McMillan lot,' did not these facts create in your mind a suspicion that the title to this lot was not all right?" To this question the witness answered, "They did not.")

Defendants call GEORGE C. ALTGELT, who testified:

I am the plaintiff's attorney. I do not know Mrs. Mary U. Schwalby personally. I received the deed to Duncan B. McMillan from Amanda J. Dignowity, attorney in fact for Anthony M. Dignowity, by mail. It was sent to me by Joseph Spence, jr., who is a lawyer and land
36 agent of San Angelo, Tom Green County, Texas. I never saw Mrs. Schwalby.

The defendants then introduced as a witness the defendant, DAVID S. STANLEY, and GEORGE J. KOSTER, civil engineer and architect, who, on oath, gave a detailed statement of the character of the improvements put upon the lot 1, block No. 2, in controversy, and said the United States had, commencing in 1882, to improve the lot and had erected thereon two wooden houses of the costs of $500.00 each, and one servant's house, cost three hundred dollars. Three hundred and seventy feet of fencing cost fifty cents per foot, $185.00; one shed cost $250.00; one shed cost $100.00.

He, David S. Stanley, said that the rent of the naked lot in block No. 2, without any improvemnnts, was simply nominal or zero. That on his first examination he had placed the value of the lot No. 1, block No. 2, at $2,500.00, but upon further reflection, judging from the sale of similar contiguous lots made a few days since, that the lot No. 1, in block No. 2, is of the value of $2,000.00, but if the Government had not made the improvements the lot would not be worth $250.00.

Cross-examination:

I do not know the actual value of the improvements. The figures named by are based upon what it would cost the Government to replace the improvements at this time, considering the cost of material and labor. I can not say that the lot is actually increased in value by these improvements; in fact, the improvements would be an incumbrance to a man who wanted the lot for a residence lot. The 370 feet of fence are not wholly upon this lot, they are mainly in the street, but would be lost to the Government if the lot is taken away. The two wooden houses are in the same situation. They are situated $\frac{2}{3}$ upon the lot and $\frac{1}{3}$ upon what formerly was Pine street. The $\frac{1}{3}$ on Pine street would be valueless if the $\frac{2}{3}$ upon the lot were taken down.

37 Plaintiff's and intervenor's evidence in rebuttal.

Plaintiff and intervenor read the following extracts from the proceedings of the city council of the city of San Antonio, to wit:

Regular meeting of the city council. Tuesday, June 1st, 1875. Present: His Honor James H. French, mayor; Aldermen Dashiell, Sweeney, Chavez, Schreiner, Smith, Hahn, Prescott, Kiolbassa, McAllister, and Muench. Absent: Aldermen Teel and Degener.

The special committee appointed at a former meeting of the board to purchase the additional land required for a cite for the quartermaster's depot made the following report, to wit:

To the honorable city council of the city of San Antonio:

Your special committee appointed at your meeting on the 27th ult. beg leave to submit the following report, to wit:

Pursuant to the authority conferred by said resolution, we have made the following purchases, viz:

3 lots of Adams & Wikes, at $300 each	$900.00
4 " " Mrs. A. J. Dignowity for	1,500.00
3 " " Smith et als., 1,000 gold	1,147.50
4 " " Mrs. P. Fox, 1,100 silver	1,202.50
Expenses attending purchase from Mrs. Fox	256.00
Total	5,006.00

Mrs. Fox being a resident of Laredo, your committee deemed it best to send an agent at once to that place and consummate the purchase, and not to wait the necessary delays incident to a correspondence by mail. We did this, believing it the interest of all parties that the matter should be closed as soon as possible.

The title of one lot we have not yet been able to perfect, but have purchased of Mrs. Dignowity her interest therein for $150 c'y. Deducting this amount from the total of $5,006.00 will leave $4,856.00 paid for thirteen (13) lots, or an average of $373.54 c'y. per lot. We consider these prices, under the circumstances, reasonable. The condition of our finances would not permit the payment of this amount from the city treasury. We therefore negotiated a loan of $4,750.00 from Messrs. Bennett & Thornton, payable in (8) months, at 12% interest, on the credit of this city, and respectfully request your honorable body that an appropriation for the amount with interest ($5,153.00) be made from the contingent fund to pay the obligation of the city at the maturity thereof.

In conclusion, we recommend the adoption of the following ordinance, to wit:

Ord. No. 15.

Be it resolved by the city council of the city of San Antonio, That,

Whereas, in accordance with a resolution of this board passed on the 27th of April, 1875, the mayor was authorized and directed to purchase additional lots in block No. 2, subdivision of lot No. 1, range 4, district 1, adjoining the land previously donated by the city to the U. S. Government for a depot, and

Whereas, the mayor having purchased said lots from Adams & Wickes, A. J. Dignowity, C. P. Smith et als., and Mrs. Pauline Fox, that said purchase be in all things confirmed, and

Whereas, the said lots and parcels of ground have been purchased as aforesaid, for the purpose of donating the same to the Government of the United States for military and other public uses,

Therefore, be it resolved, That the said mayor be, and is hereby, authorized and directed to execute and deliver a good and sufficient warranty deed of gift or donation of each and all said lots or parcels of land to the Government of the United States, as aforesaid, and that, in accordance with section 57 of the city charter, all streets, alleys, and sidewalks in said block No. 2, subdivision of lot No. 1, intended by this ordinance to be conveyed to the Government of the United States, be and are hereby declared forever closed and abolished, and the same are hereby authorized to be conveyed as part and parcel of said block No. 2 to the Government of the United States.

All of which is respectfully submitted.

J. H. FRENCH,
Mayor and Ch'm'n Com.
GEO. R. DASHIELL.
SAM. S. SMITH.
M. MUENCH.
F. HAHN.

Which report was unanimously adopted.

We, the undersigned attorneys for plaintiff, intervenor, and defendants, hereby agree that the above is a true and correct statement of the facts proved upon the trial of said cause.

GEO. C. ALTGELT & C. F. CARSNER,
Attys. for Plaintiffs & Intervenor.
A. J. EVANS,
Atty. for Defts. & U. S.

Approved:

W. W. KING,
District Judge.

Filed May 15th, 1890.

GEO. R. DASHIELL,
Clk. D. C. B. Co.
By M. YTURRI, Jr.,
Deputy.

Appeal bond.

MARY U. SCHWALBY, J. A. SCHWALBY, JOSEPH E. Spence, jr.,
vs.
DAVID S. STANLEY, WILLIAM R. GIBSON, Samuel T. Cushing, J. C. Baily, United States of America. } No. 191.

In the honorable district court of Bexar County, Texas, 45th judicial district.

Whereas, in the above numbered cause, pending in district court of Bexar County, Texas, 45th judicial district, and at a regular term of said court, to wit, on the 24th day of March, 1890, the said Mary U. Schwalby and Joseph E. Spence, jr., recovered judgment against the said
40 David S. Stanley, William R. Gibson, Samuel T. Cushing, J. C. Bailey, and the United States of America for the title and possession of a certain tract of land, to wit: All that certain tract of land situated in the city of San Antonio, Bexar County, Texas, being lot No. one (1), in block No. two (2), a subdivision of original lot No. one (1), in range No. four (4), in district No. one (1), of the city tract of the city of San Antonio, on the east side of the San Antonio River, according to the map and survey of said city, said subdivision being according to the plan thereof made for A. M. Dignowity by G. Freisleben, city surveyor, fronting on Grayson street 32 varas and running back 90 varas, and said judgment providing further that the same shall be enforced upon condition only that plaintiffs pay to the defendant, the United States of America, fifteen hundred and twenty-one dollars, value of improvements, and that defendants pay costs, &c., &c., from which judgment the said defendants have taken an appeal to our Supreme Court and desire to suspend the execution of said judgment during the pendency of said appeal;

Now, therefore, we, David S. Stanley, William R. Gibson, Samuel T. Cushing, J. C. Bailey, and the United States of America, as principals,

and Wiliam Smith and as sureties, acknowledge ourselves bound to pay Mary U. Schwalby, J. A. Schwalby, and Joseph E. Spence, jr., the sum of five hundred dollars, conditioned that the said David S. Stanley, William R. Gibson, Samuel T. Cushing, J. C. Bailey, and the United States of America shall prosecute their appeal with effect, and in case the judgment of the appellate court shall be against them, that they shall perform its judgment, sentence, and decree, and pay all such damages as said court may award against them, and also pay to the said Mary U. Schwalby, and J. A. Schwalby, and Joseph E. Spence, jr., in case the judgment of the appellate court shall be affirmed, the value of the rent
41 of the property recovered in any suit which may be brought therefor.

Witness our hands and seals this 24th day of May, 1890.

DAVID S. STANLEY. [L. S.]
W. R. GIBSON. [L. S.]
JOSEPH C. BAILEY. [L. S.]
SAMUEL T. CUSHING. [L. S.]
By A. J. EVANS,
Attorney.
UNITED STATES OF AMERICA. [L. S.]
By A. J. EVANS,
U. S. Att'y West. Dist. Tex.
WILLIAM MUTH. [L. S.]
JOHN MUELLER. [L. S.]

Approved May 28th, 1890.

GEO. R. DASHIELL,
Clk D. C. B. Co.
By M. YTURRI, Jr.,
Deputy.

Filed May 28th, 1890.

GEO. R. DASHIELL,
Clk D. C. B. Co.
By M. YTURRI, Jr.,
Deputy.

Assignment of errors.

MARY U. SCHWALBY
vs.
DAVID S. STANLEY ET AL. } No. 191.

Now come the defendants in the court below, and the plaintiffs in appeal, or appellants, and most respectfully file herein their assignment of error in the proceedings and judgments of the court below.

1st. The court erred in holding that the defendants and the United States of America "can not set up or plead the statute of limitation of three, five, or ten years. It is ordered by the court that the said pleas of the United States of the statute of limitation of three, five, and ten years be stricken out."

42 (See transcript pages eleven and twelve, also pages five and six.)

2nd. The court erred in admitting a certain deed from one D.

W. McMillan to Joseph Spence, jr., for the lot or tract of land described in the plaintiff's (Mary U. Schwalby's) original petition, executed on the twenty-sixth day of March, 1889, and recorded on the same day, because the said deed, if admitted in evidence, showed that whatever right or title the said Joseph Spence, jr., might claim under said deed was acquired after filing of this suit, and from one D. W. McMillan, who never was a party to this suit, and because the said Joseph Spence, jr., had no interest in this suit at the time the same was filed, and because the court admitted the said Joseph Spence, jr., to become a party in the suit as an intervenor without leave or motion, and then when a party converted him from an intervenor to a joint plaintiff in the judgment. (See Transcript, pages 10, 14, 15.) And because the said Joseph Spence, jr., was an interloper in the case, and the said Mary U. Schwalby never recognized him in her pleadings as a joint plaintiff, and his interests, if any, were adverse to her.

3rd. The court erred in its judgment in awarding to the plaintiff, Mary U. Schwalby, who jointly claimed but a two-thirds interest in the tract of land, the whole value of the land, in the adjustment of the value of the improvements and of the lands. (See Transcript, pages 15–17.)

4th. The court erred in not adjudging the land to be the property of the defendants upon their pleadings and proof of innocent purchasers for a valuable consideration without notice.

5th. The court erred in adjudging the land to be the property of the defendants upon their pleadings and proof of an estoppel en pais.

6th. The court erred in adjudging that the deed from Mrs. A. J. Dignowity, to the plaintiff's intestate, carried title to the land when it was clearly shown in proof that the purchase money had never been paid in full.

43

7th. The court erred in not holding that the deed from Mrs. A. J. Dignowity to the plaintiff's intestate was in law and equity a stale demand, not having been recorded, nor claim of title thereunder set up for a period of twenty years.

9th. The court erred in admitting the deed from Mrs. A. J. Dignowity to the plaintiff's intestate in evidence and in giving effect thereto, when the evidence strongly predominated in favor of the facts that the said Mrs. Dignowity had only delivered the deed to her attorney as an escrow, conditioned upon the payment of the full amount of the purchase money, and that said deed never was delivered by the said Mrs. Dignowity to the plaintiff's intestate.

A. J. EVANS,
H. C. CARBAUGH,
Attorneys for Appellants.

Filed January 31st, 1891.

GEO. R. DASHIELL,
Clk D. C., B. Co.,
By HENRY UMSCHEID,
Deputy.

Cross assignment of errors by plaintiffs and intervenor.

Judgment rendered in Bexar County district court, 45th judicial district of Tex.

MARY U. SCHWALBY ET AL.
vs.
DAVID S. STANLEY ET AL. } No. 191.

Now comes the appellees, Mary U. Schwalby, J. A. Schwalby, and Joseph Spence, jr., and file this cross assignment of errors, upon which they will rely for a reformation of the judgment rendered below; that is to say:

First cross assignment by appellees: The court erred in overruling the first special demurrer of the plaintiffs' to the answer of defendants' counsel, J. G. Ballance, esq., and A. J. Evans, esq., U. S. attorney, west-
44 ern district of Texas in so far as the same is filed by said attorneys for and in behalf of the United States of America, because said United States were not parties defendant in said suit, and neither of said attorneys nor the Attorney-General of the United States has authority to submit for adjudication in the courts of the State of Texas the rights of said United States of America.

Second cross assignment: The court erred in overruling the second special demurrer to the answer filed in this cause by defendants' attorneys, J. G. Ballance, esq., and A. J. Evans, esq., U. S. district attorney western district of Texas, in so far as said answer purports to be filed in behalf of said United States, because the court below had not jurisdiction to determine the controversy and issue attempted to be pleaded by said officer in behalf of said United States of America, but the same are cognizable exclusively in the courts of the United States.

Third cross assignment: The court erred in overruling the third special demurrer of plaintiffs to that portion of defendants' said answer which sets up improvements in good faith, because the said suggestion of improvements alleged to have been made in good faith is insufficient in law, because the grounds of said claim are not stated.

Fourth cross assignment: The court erred in overruling the sixth special demurrer to all that portion of defendants' said answer which alleges an innocent purchase from the city of San Antonio by the United States aforesaid, because it does not appear therefrom that the consideration of said purchase was a valuable consideration.

Fifth cross assignment: The court erred in adjudging to the defendant, the United States of America, the value of improvements claimed
45 to have been made in good faith, because said claim was not sustained by the evidence; for this, that the evidence does not show that the land recovered is actually increased in value anything by reason of said improvements.

Sixth cross assignment: The court erred in adjudging to appellants (defendants below) the value of any improvements alleged to have been made in good faith, because the evidence fails to prove that the United States were such a possessor in good faith, or would entitle them to recover the value of improvements made; for this, that the officers of the

United States Government had notice of plaintiffs' title, and in placing said improvements upon the land in controversy acted negligently and in disregard of appellees' rights to them known.

Seventh cross assignment: The judgment of the court awarding the appellant, the United States of America, the value of improvements to the amount of seventeen hundred and twenty-one dollars is contrary to the evidence and excessive; for this, that said awards include the value of improvements that are not upon the land adjudged to appellees, but would become valueless if detached from those improvements that are upon the land.

Appellees pray that the judgment may be reformed so as to adjudge to them the land in controversy, with the value of the rents and profits as proved; and that appellant may be adjudged nothing upon their suggestion of improvements alleged to have been made in good faith, for costs of both courts, &c.

GEO. C. ALTGELT,
Attorney for Appellees.

Filed January 28th, 1891.

GEO. R. DASHIELL,
Clk D. C., B. Co.

46 *Bill of costs.*

CLERK'S FEES.	
Docketing	.40
Writs and copies	.75
Citations	6.00
Taking bond	1.50
Docketing motions	.15
Filing papers	6.75
Entering appearances	.75
" continuances	.60
" orders	3.00
" judgment	.75
" decree	1.00
Commission to take deposition	1.50
Copies of interrogatories	4.50
Taking depositions	5.15
Subpœnas	1.50
Additional names	.75
Swearing witnesses	.60
Certificates	.75
Transcript	35.00
Taxing costs	.25
	$71.65

SHERIFF'S FEES.	
Executing writs	1.00
" citations	6.00
" subpœnas	5.00
Jury fee	.50
Mileage	.30
	$12.80

	$84.45

Certificate.

THE STATE OF TEXAS,
County of Bexar:

47 I, Nat Lewis, clerk of the district court of Bexar County, do hereby certify that the foregoing contains a true and correct transcript of all the orders and proceedings had in a cause on the civil docket of the district court of the 45th judicial district, No. 191, wherein

Mary U. Schwalby and J. A. Schwalby are the plaintiffs, and David S. Stanley et al. are the defendants, and Joseph Spence, jr., is the intervenor.

Witness my hand and the seal of said court at office in San Antonio, the 25th day of April, A. D. 1890.

[SEAL.] NAT LEWIS,
Clk. D. C. B. Co.

(Indorsed:) No. 7807. 2nd assignment. David S. Stanley et al., appellant, vs. Mary U. Schwalby et al., appellee'. From the district court of the 45th judicial district in and for Bexar County. Applied for by A. J. Evans, U. S. atty., on the 25th day of April, 1891, and delivered to Henry Terrell, ass. U. S. atty., on the 25th day of April, 1891. Nat Lewis, clerk of the district court of Bexar Co. Filed in supreme court at Austin, the 27th day of April, 1891. Chas. S. Morse, clerk, by F. T. Connerly, deputy.

Filed in supreme court at Tyler, Sep. 19, 1891. S. D. Reaves, clerk.

Filed in supreme court at Galveston, Jan. 4, 1892. D. D. Atchison, clerk.

Orders in supreme court.

April 30, 1891, set for June 9.
June 9, 1891, submitted on briefs for both parties.
June 26, 1891, transferred to Tyler.
December 22, 1891, transferred to Galveston.

48 DAVID S. STANLEY ET AL., appellants, *vs.* MARY U. SCHWALBY ET AL., APPELLEES. } No. 7807. Appeal from Bexar County.

This is an action of trespass to try title brought by Mrs. Schwalby against David S. Stanley and three other persons, and she alleged that she was the owner of an undivided one-third of the lot; that defendants entered without title, and there was prayer for possession of the entire lot.

Joseph Spence intervened in the case and asserted title to one-third of the lot through a conveyance made to him by one of the three heirs of Duncan B. McMillan, deceased, who was also the father of Mrs. Schwalby.

Defendant Stanley, for himself and the others, answered, asserting that as individuals they did not claim and had no title to the lot, but that they were lawfully in possession thereof as officers and agents of the United States of America.

They asserted that the United States had complete title and entered the plea of "not guilty," which was stated to be done officially.

The district attorney for the United States, declaring that he acted through instructions from the Attorney-General, filed an answer for the United States, in which the defendants joined.

This answer, after stating that the defendants, as individuals, made no claim to the property, contained a plea of "not guilty;" alleged that the United States and the vendor were bona fide purchasers; pleaded an

estoppel claimed to grow out of the fact that plaintiff and intervenor asserted no claim to the lot while the Government of the United States was improving it with other property to be used as military headquarters for her army in Texas; pleaded the statutes of limitation of three, five, and ten years, and for the United States made claim for valuable improvements.

49 The plaintiff filed exceptions to so much of the answer as purported to make the United States a party defendant, asserting that no authority existed in the attorneys representing the parties, nor in the Attorney-General, to make the United States a party defendant to this action in the State court, and raising the question of jurisdiction generally, in so far as the United States was concerned.

The pleas of limitation filed in behalf of the United States were also excepted to, as were the other pleas filed in that behalf. The court sustained the exceptions to the pleas of limitation and also to the claim for improvements, but overruled all other exceptions.

The claim for improvements was amended, and on trial a judgment was rendered in favor of plaintiff and intervenor against the original defendants and the United States, establishing their title to two-thirds of the lot and awarding to them a writ of possession for the whole, the issuance of which was suspended until such time as they should pay for improvements or become entitled to the writ by the failure of the United States to pay the assessed value of the lot.

The court found that the United States had made improvements in good faith of the value of seventeen hundred and twenty dollars; and that the value of the use of the lot was two hundred dollars, while the value of the lot was found to be twenty-five hundred dollars, and on these findings the judgment usual in trespass to try title was rendered, from which all parties gave notice of appeal, which was perfected by the original defendants and the United States with supersedeas bond, and all parties have assigned error.

It was agreed that Anthony M. Dignowity was common source of title, and plaintiff and intervenor proved that Dignowity, through attor-

50 ney, conveyed the lot in controversy to Duncan B. McMillan by deed of date May 9, 1860, which recited a consideration paid, contained clause of general warranty, and was duly acknowledged on the day it was executed, but was not recorded until September 30, 1889.

The death of McMillan was shown, and it was proved that only three children survive him, and that plaintiff is one of these and the vendor on intervenor another.

Dignowity died testate, and by the terms of his will, which was duly probated in 1875, his property passed to his widow, who, on May 1, 1875, by quit-claim deed conveyed the lot in controversy to the city of San Antonio, describing it as the lot "known as the McMillan lot."

The city of San San Antonio conveyed this lot and other property conveyed by Mrs. Dignowity to it, to the United States by deed of date June 16, 1875. At the time the city of San Antonio bought from Mrs. Dignowity she informed the mayor of the claim of McMillan and refused to give other than a quitclaim deed to the lot.

The city donated the lot in controversy and other land to the United States, and the United States district attorney, whose duty it was made to

examine the title before the donation was accepted, was informed of the conveyance to McMillan, but he testified that he satisfied himself that McMillan had not paid all the purchase money, and he therefore advised that the Government would get good title.

Under this state of facts there can be no doubt of the validity of the title asserted by plaintiff and intervenor, and it leaves no foundation for the claim that the city of San Antonio or the United States was an innocent purchaser.

Title to the lot passed to McMillan whether all the purchase money was paid or not, and no persons other than McMillan and his vendor had any interest in that matter. Neither by pleadings nor proof did the
51 original defendants assert any claim to the lot nor such a possession or claim of right in themselves as would support any plea of limitation, and the judgment against them is correct, if holding as they did, officially, the action might be maintained against them as against other wrongdoers.

Under the decision in United States vs. Lee (106 U. S.) and the cases therein cited, it must be held while the United States can not be sued except in such cases as may be prescribed by Congress, that the officers and agents of that Government when holding possession of property for public use in their official characters, may be sued in any court of competent jurisdiction, by the owner of such property, and such relief given against them as might be if their holding was not official.

The plea of these defendants was, in effect, an assertion of a superior outstanding title in the United States and the court had power to examine and determine that question with a view to ascertain and determine the right of the parties properly before the court, although its decision on the question of title or right to possession would not bar the right of the United States to resort to any lawful remedy for the maintenance of any right it may have to the property if it was not properly made a defendant in the case, for, as said in the case referred to, under such facts, "the United States may proceed by bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution."

52 The grounds on which actions against officers of the United States are held to be maintainable in cases like this are fully stated in United States vs. Lee, from which the Supreme Court of the United States has shown no disposition to recede, although the decision was by a divided court. Hans vs. Louisiana, 134 U. S., 16; in re Ayers, 123 U. S., 501, 511–514. The pleas of estoppel and stale claim are so manifestly without foundation that it is not necessary to further notice them.

That intervenor acquired title after the action was brought by Mrs. Schwalby was a matter in no way affecting his right to assert his title when and in the manner he did.

If the United States had been properly before the court as a defendant we are of opinion that its pleas of limitation should have been, as they were, stricken out; for, when no action could be brought against them, limitation ought not to run in their favor.

It is held that the United States, whether named in a State statute of limitations or not, is not bound thereby (United States vs. Thompson, 98 U. S., 486), and unless otherwise expressed in the statute the rule is well established that such statutes are not applicable to a State or to the United States.

Not applicable to them when they appear as defendants any more than when they appear as plaintiffs, and this is so for reasons of public policy in the one case and from necessity and justice in the other; for it would be contrary to reason to hold that it was the intention of the law-making power that a right should be barred by failure to bring an action within a prescribed time when at the same time right to bring an action was denied.

Limitation runs when right or cause of action accrues and not before, and this does not exist unless facts exist which authorize the person asserting claim to ask relief from some court of justice against the person
53 who ought to make reparation. It involves the existence of the right to sue as well as of facts deemed sufficient in a general sense to constitute a cause of action, and the right to sue may depend on the existence of a person to be sued or upon the denial of the right to sue a State or other corporation, which, but for such legal denial, would be subject to suit.

In Baxter vs. The State (10 Wis., 454), it was held that the State was entitled to make the defense of limitation in a suit brought against it, although the right was not expressly given; and the argument in support of the ruling seems to be drawn from rulings based on prerogative of English kings, under which it was held that, while the king was not bound by a statute unless specially named, "he shall take the benefit of a statute though he be not named."

It appears from the opinion, however, that the statutes of that State authorized suits to be brought against the State as against persons, and required those to be determined "as the law and very right of the case may require."

As late as 1876, it was held in England in an action by a subject against the Queen, in her official character, that she could not take advantage of the statutes of limitation, and this was based on the proposition that the acts of Parliament in regard to statutes of limitation "have relation only to the course of proceedure between subject and subject. Rustomjee vs. The Queen, L. R. 1 Q. B. D., 487.

Even if the defendants might have set up any defense the United States might have set up, for the purpose of showing outstanding title in the latter, the exceptions to the pleas of limitation were properly sustained.

It is urged by cross-assignment of error that the court erred in overruling an exception which questioned the power of the United States
54 district attorney, even under the direction of the Attorney-General of the United States, to submit the Government to the jurisdiction of the State court, and thereby clothe that court with jurisdiction to render a judgment which would bind the United States.

The instructions of the Attorney-General are not found in the record, and we are not referred to any act of Congress which empowers him to make the United States a party, either plaintiff or defendant, to an action in a State court, and in the absence of such a law jurisdiction can not be thus conferred. Carr vs. United States (98 U. S., 433); United States vs. Lee (106 U. S., 196).

It is probably true that it was intended by the Attorney-General that this action against the officers of the Government should be defended by the United States district attorney, as were cases above cited and others therein referred to, but not that the United States should be made a defendant; but, be this as it may, we are of opinion that the exception should have beed sustained, and that the district court did not acquire jurisdiction over any controversy between the United States and the plaintiff and intervenor.

Many objections are made to the judgment in favor of the United States for the value of improvements made on the lot, some of which we would have to sustain, were it necessary to pass upon them, but in view of the fact that the court had no jurisdiction to render judgment either in favor or against the United States, the judgment in so far must be set aside, without reference to the validity of any claim that might be made for the value of improvements were these parties before the court between whom such an issue could be tried.

Defendants admitted that they held possession of the lot, and it is not urged that the judgment for rents is greater than the reasonable value of the use while they were in possession, but the question arises whether
55 a judgment for this can be rendered against them, holding, as they did as officers of the United States Government, presumably under orders from their superiors.

There is no doubt that under some circumstances a military officer may seize and hold private property lawfully, but as there can be no claim that the property in controversy was taken possession of and held under such circumstances, it becomes unnecessary to consider when this may lawfully be done.

That the lot in controversy does not belong to the United States is clear, and that there is no law under which defendants could lawfully take possession of and hold it is equally clear.

This being true, the majority of this court are of opinion that defendants stand under the same liability as would any private citizen who had taken possession of and held the property, and the fact that this may have been done by them as military officers of the United States, under the orders of their superiors, a fact neither alleged nor proved, which, however, might well be presumed, in no manner affects their liability, for no such orders could lawfully be given.

Under the decisions of the Supreme Court of the United States we do not feel authorized to consider this an open question.

In Mitchell *vs.* Harmony (13 Howard, 128), an officer of the United States Army was held liable to a person whose property he had taken possession of, under the orders of his superior, without intent to subserve any personal interest and solely with a view to the public welfare, which it was believed would be promoted thereby. The seizure was made during the war with Mexico and within the territory of that nation.

In disposing of the case it was said: "If the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant, even if the commander
56 had abused his power or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right, and the verdict finds that this necessity did not exist. Consequently the order given was an order to do an illegal act, to commit a trespass upon the property of another, and can afford no justification to the person by whom it was executed; * * and upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior."

In the case a judgment for more than one hundred thousand dollars, which included interest and costs, was rendered.

In another case, in which an action was brought against military officers of the United States for an illegal seizure of private property, they were held liable for the damages resulting, and in reference to a plea setting up the command of a superior officer, the court said: "It is a sufficient answer to the plea, that the defendants were subordinate officers acting under the orders of a superior, to say that whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in the time of peace by orders eminating from a source which is itself without authority; * * * the objection fatal to all this class of defenses is that in that locality they were utterly without any authority in the premises; and their honest belief that they had is no defense in their case more than in any other, where a party mistaking his rights commits a trespass by forcibly seizing and taking away another man's property. There was here no process from a competent court nor any order from any source having authority, and there is, therefore, no defence. Bates vs. Clark (95 U. S., 209).

57 Referring to the case of United States vs. Lee, that court again said: "In that case the plaintiffs had been wrongfully dispossessed of their real estate by defendants, claiming to act under the authority of the United States. That authority could exist only as it was conferred by law, and as they were unable to show any lawful authority under the United States, it was held that there was nothing to prevent the judgment of the court against them as individuals for their individual wrong or trespass." In re Ayers (123 U. S., 501).

Cases might be multiplied upon this subject, and many will be found cited under the following cases: Witron vs. McKenzie (42 Am. Dec., 51); Farmer vs. Lewis (89 Am. Dec., 610); Hogue vs. Penn (96 Am. Dec., 274).

Defendants under the law were trespassers, though acting under a sense of duty; and, though this may seem harsh, we see no legal ground on which they can be relieved from the full liability for the wrong done to plaintiff and intervenor to which they would be subject had they held as private persons under claim of right in themselves or as tenants of some other person.

Congress has not provided any judicial tribunal at whose hands parties may have redress for such injuries as plaintiff and intervenor have received through officers of the United States (Gibbons vs. United States, 8 Wall.,

269; Langford vs. United States, 341), and the plainest principles of justice require that those who have unlawfully held possession of the property of appellees shall not only surrender it, but also compensate for its use.

The judgment entered by the court below will be set aside and judgment will be here rendered dismissing the United States from the case as a party and in favor of plaintiff and intervenor against David S. Stanley, William R. Gibson, Samuel F. Cushing, and J. C. Bailey for the land described in the petition, for which writ of possession may issue;
58 and judgment will be further entered in favor of plaintiff and intervenor against defendants and the sureties on their appeal bond for the sum of two hundred dollars, with interest thereon at the rate of eight per cent per annum from March 24, 1890, until paid, together with all cost incurred in this court and in the court below, for which execution may issue.

It is so ordered.

STAYTON,
Chief Justice.

Justice Henry dissents from so much of the above opinion as holds the defendants liable for rent of the property.

59 *Copy of judgment.*

This cause came on to be heard on the transcript of the record, and the same having been inspected because it is the opinion of this court there was error in the judgment of the court below, it is therefore adjudged, ordered, and decreed that said judgment be reversed, and the court here proceeding to render such judgment as should have been rendered by the court below, it is adjudged, ordered, and decreed that the judgment of the court below be set aside and this action dismissed as to the United States of America, and that the appellees, Mary U. & J. A. Schwalby and Joseph E. Spence, jr., recover from the appellants, D. S. Stanley, W. R. Gibson, I. T. Cushing, and J. C. Bailey the following described land: All that certain tract of land situated in the city of San Antonio, Bexar Co., Texas, being lot numbered one in block number two, a subdivision of original lot number one, in range No. 4, in district No. one, of the city tract of the city of San Antonio, on the east side of the San Antonio River, according to the map and survey of said city, said subdivision being according to the plan thereof made for A. M. Dignowity, by G. Freisleben, city surveyor, fronting on Grayson street, 32 vrs., and running back 90 vrs., and that they have their writ of possession therefor. And it is further ordered that said appellees recover from said appellants and their sureties, Wm. Muth and Jno. Mueller, the sum of $200.00 with 8% interest from March 24, 1890, until paid, together with all costs in this behalf incurred, both in this court and in the court below, and that this decision be certified below for observance.

60 Clerk's Office, Supreme Court of Texas.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the foregoing fifty-nine pages contain a true and correct copy of the transcript of the record of proceedings had in the district court of Bexar County, the indorsements thereon, orders made in

supreme court, the opinion of the supreme court, and the judgment therein rendered in cause No. 7807, entitled, David S. Stanley et al., appellants, vs. Mary U. Schwalby et al., appellees, as the same appear of record, and now on file in this office.

In testimony whereof I hereunto sign my name and hereon impress the seal of said supreme court this, the 6th day of June, A. D. 1892.

[SEAL.] CHAS. S. MORSE,
Clerk, &c.

61 *To the Honorable L. Q. C. Lamar, one of the justices of Supreme Court of United States.*

Your complainants, David S. Stanley, W. R. Gibson, S. T. Cushing, and J. C. Baily, and the United States of America, complaining, say:

That at the late March term of the supreme court of Texas, A. D. 1892, a final decision was rendered in a suit wherein one Mary U. Schwalby and J. A. Schwalby and Joseph Spence, jr., were and are plaintiffs, and David S. Stanley, W. R. Gibson, S. T. Cushing, J. C. Baily, and the United States of America are and were defendants.

That a final judgment and decree in said suit aforesaid was so rendered on the 4th day of March, A. D. 1892, in said aforesaid supreme court of Texas, being then and there the highest court of the State of Texas in which a decision in said aforesaid suit could be had; and further that the right and privilege and immunity of the said United States in said suit to be made a party under the Constitution, and set up and plead the right, title, and possession of the United States of America to the land sued for by the plaintiffs, was drawn in question in said suit, and the decision is against such title, right, privilege, and immunity, specially set up by defendants, and further that the title, right, privilege, and immunity claimed under the Constitution and laws of the United States by the United States to own, possess, and hold real estate in Texas, for military reservations under subdivision seventeen, section 8, article 1, of Constitution, and to set up in said suit title and right to hold such real estate for such purposes, and to defend suits brought against her soldiers in possession of said real estate, was drawn in question in said suit, and decided against the United States; and further, that the validity of an authority exercised under the United States to hold real estate for a military reservation by defendants, and to set up, when sued, the title of the United States to such realty, was drawn in question in said suit, and
62 decided against defendants, all of which is error in said supreme court of Texas.

Wherefore, your complainants pray for a writ of error to said supreme court of Texas to remove said cause to the Supreme Court of the United States, to the end that said errors be corrected.

ANDREW J. EVANS,
U. S. Att'y for the Western District of Texas, and Attorney for the United States of America, and Attorney for the other Defendants.
H. C. CARBAUGH,
Att'y at Law, Att'y for Defendants, David S. Stanley, W. R. Gibson, S. T. Cushing, J. C. Baily.

(Endorsed :) No. —. Mary U. Schwalby, J. A. Schwalby & Joseph Spence, jr., vs. The United States of America, David S. Stanley, W. R. Gibson, S. T. Cushing & J. C. Baily. Petition for writ of error. For clerk, Sup. Ct. Filed in supreme court of Texas, May 30, 1892. Chas. S. Morse, clerk, &c.

Clerk's Office, Supreme Court.

I, Chas. S. Morse, clerk of the supreme court of Texas at Austin, hereby certify that the above and foregoing one page contain a true and correct copy of the original petition for writ of error, which said petition is now on file in my office.

Witness my hand and the seal of said court this the 17th day of June, A. D. 1892.

[SEAL.] CHAS. S. MORSE,
Clerk, &c.

63 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the supreme court of the State of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Mary U. Schwalby, J. A. Schwalby, and Joseph Spence, jr., plaintiffs, and David S. Stanley, W. R. Gibson, S. T. Cushing, J. C. Baily, and The United States of America, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or

64 wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said defendants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 25th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
L. Q. C. LAMAR,
Associate Justice of the
Supreme Court of the United States.

The above writ to operate as a supersedeas without a bond, as provided by section 1001, Revised Statutes, the same being sued out by direction of the Secretary of War.

LAMAR, J.

(Indorsed:) Original writ of error. To be attached to transcript. Filed in supreme court of Texas, May 30, A. D. 1892.

CHAS. S. MORSE,
Clerk, &c.

65 UNITED STATES OF AMERICA, *ss:*

To Mary U. Schwalby, J. A. Schwalby, and Joseph Spence, jr., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Texas, wherein David S. Stanley, W. R. Gibson, S. T. Cushing, J. C. Baily, and the United States of America are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable L. Q. C. Lamar, associate justice of the Supreme Court of the United States, this 25th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

L. Q. C. LAMAR,
Associate Justice of the Supreme Court of the United States.

On this 28 day of May, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared Addison Kilgore before me, the subscriber, B. G. Duval, clerk U. S. circuit court western district Texas, and makes oath that he delivered a true copy of the within citation to George C. Aultgelt, attorney for defendants in error.

ADDISON KILGORE.

Sworn to and subscribed the 28 day of May, A. D. 1892.

[SEAL] B. G. DUVALL,
Clerk, &c.

(Indorsed:) Original citation. Marshal makes return. Filed in supreme court of Texas, May 30, A. D. 1892. Chas. S. Morse, clerk, &c.

66 Clerk's office, supreme court.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the foregoing sixty-five (65) pages contain a true and correct copy of all the proceedings had in cause No. 7807, entitled David S. Stanley et al., appellants, vs. Mary U. Schwalby et al., appellees, as the same appears from the records and papers now on file in my office. I further certify that I have retained in my office true and correct copies of the original writ of error and the citation in error, both of said original writs being hereto attached, and that no writ of error, bond, or assignment of error have been presented to me to be filed in this cause.

Witness my hand and the seal of said court this the 17th day of June, A. D. 1892.

[SEAL.] CHAS. S. MORSE,
Clerk, &c.

(Indorsed on cover:) Case No. 15062. Term No., 1092. David S. Stanley, W. R. Gibson, S. T. Cushing, J. C. Baily, and The United States of America, plaintiffs in error, vs. Mary U. Schwalby, J. A. Schwalby, & Joseph Spence, jr. Filed June 23, 1892. Texas supreme court.

147 U.S. 85-88

FILED.
JAN 5 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

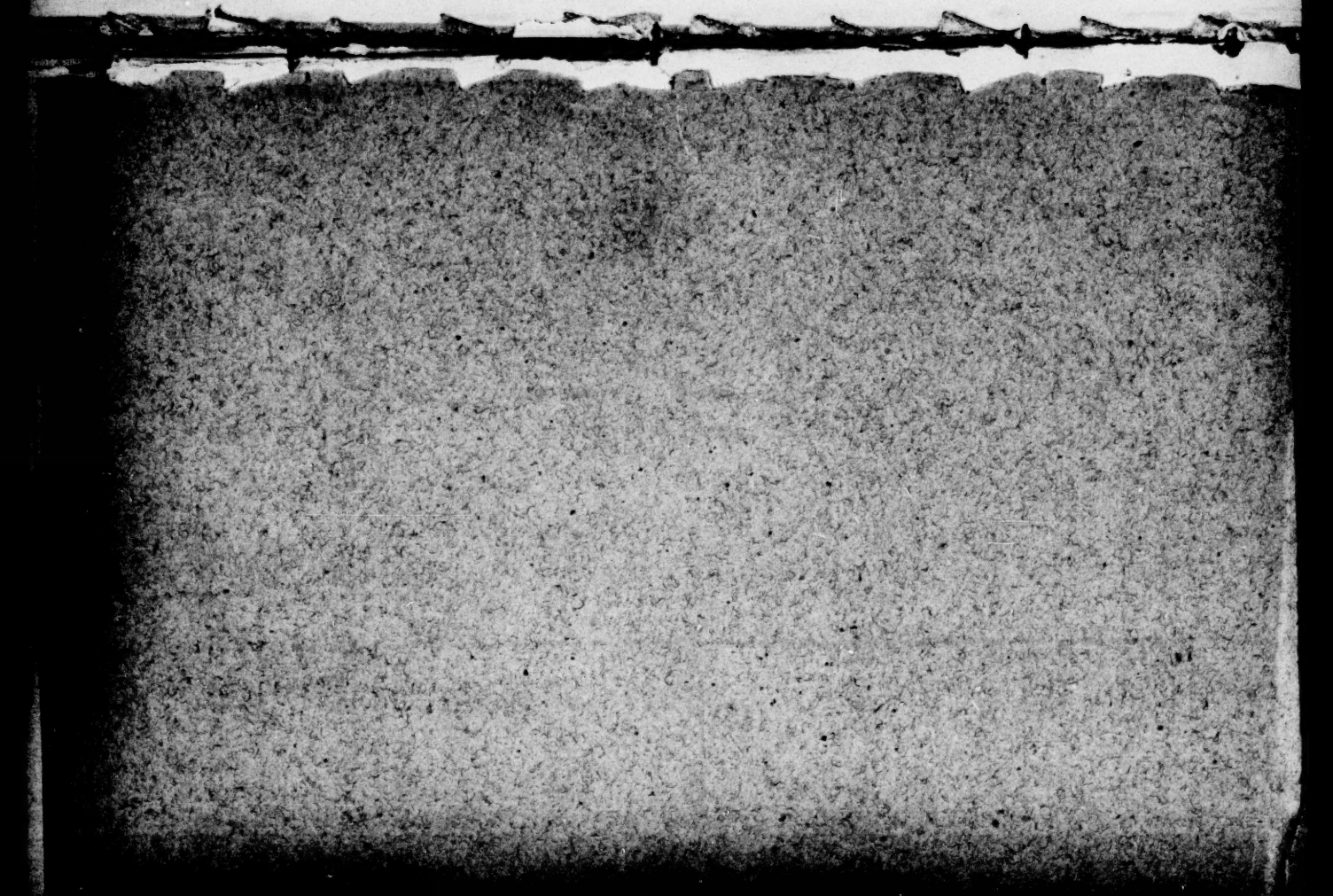
OCTOBER TERM, 1892.

DAVID S. STANLEY AND OTHERS, PLAINTIFFS in error,
vs.
MARY U. SCHWALBY, J. A. SCHWALBY, AND Joseph Spence, jr.
} No. 1092.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR THE PLAINTIFFS IN ERROR.

WM. A. MAURY,
Assistant Attorney-General.



In the Supreme Court of the United States.

OCTOBER TERM, 1892.

DAVID S. STANLEY AND OTHERS, PLAINTIFFS in error,
vs.
MARY U. SCHWALBY, J. A. SCHWALBY, AND Joseph Spence, jr.
} No. 1092.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR THE PLAINTIFFS IN ERROR.

This is an action brought by the defendant in error, Mary U. Schwalby, who was afterwards joined by her husband and by Joseph Spence, jr., as intervenor, to recover a parcel of land situate in the city of San Antonio, Tex.

The land in question is part of a military reservation of the United States, and is used and occupied by the United States as a military post, and the plaintiffs in error, the defendants below, are officers of the Army of the United States, holding and occupying the said land by the command of the United States, and disclaiming any right or interest in the premises, except in so far as it is

their duty to protect and defend the interests of the United States.

It is deemed unnecessary to notice the pleadings further than to state that the defendants, as already said, claimed to hold the land in question as officers of the United States, and pleaded not guilty to the trespasses imputed to them in the petition.

The United States appeared by its attorney, "acting by and through instructions from the Attorney-General of the United States," and maintained that no valid cause of action was presented in the petition (p. 2).

The defendants pleaded specially—

(1) That the land held by them as aforesaid has been vested, by perfect duly recorded title, in the United States since the year 1875.

(2) That the city of San Antonio purchased the premises from A. J. Dignowity and others for the consideration of $5,000, *with no notice whatever* of plaintiff's claim of title, and that the city conveyed the same to the United States on the consideration "*that the United States of America would establish and keep the military headquarters of the United States Army in Texas on said premises*," and that the United States had no notice of plaintiff's claim, and that the city being an innocent purchaser, the United States are such also.

(3) That plaintiffs, having stood by and seen the United States make improvements of great value, are now estopped to assert title to the said premises.

(4) That the United States is entitled to the protection of the ten-year limitation of the law of Texas.

(5) That the United States is entitled to the protection of the five-year limitation of the law of said State.

(6) That the United States is entitled to the three-year limitation of the law of said State.

(7) That plaintiffs claim under an unrecorded deed, but that no such deed ever existed, and that any deed produced as such is a forgery: furthermore, that if any such deed exists it was without consideration.

(8) That the United States have been in adverse possession for a year anterior to this suit, in good faith, and have made permanent and valuable improvements; that is to say, the United States have built two houses worth $1,000 each, have laid out $100 in clearing the land of brush, $500 in building a fence, and $500 in making sidewalks, an allowance for which is claimed.

PLEAS STRICKEN OUT AND EXCEPTIONS, ETC.

The three pleas of limitation were stricken out, on the ground that the United States can not plead the statutes of limitations, to which ruling the United States excepted (pp. 9, 10); the pleas claiming allowances for improvements were also stricken out, to which exception was taken, and the defendants' demurrers, general and special, were overruled, to which, also, exception was taken, and leave given the defendants to amend (p. 10).

The defendants put in new pleas claiming improvements (pp. 10, 11).

SUBMISSION TO COURT.

The whole matter of law and fact was submitted to the Court (p. 13).

On the trial considerable testimony was given on both sides, mostly on the subject of *bona fides* and the value of the improvements (pp. 15–25).

JUDGMENT.

The court being of opinion that the plaintiffs, Schwalby and Spence, were each entitled to recover one-third of the land in question and the possession of the whole, and being also of opinion that the United States was entitled to recover $1,521 for said improvements, that being the difference between the value of said improvements and the amount found due by the United States for their use and occupation of the said premises (pp. 13, 14), it was accordingly so adjudged. To this judgment exception was taken by all the parties (p. 14), and, in open court due notice of *appeal* was given (p. 14) and perfected (p. 25).

COURT OF APPEALS.

The court of appeals of Texas, holding that the defendants were not in possession of the land in good faith, reversed the judgment below and gave judgment for the land, and for $200, the value of defendant's use and occupation thereof, with interest, and dismissed the United States from the case as a party (p. 36).

ASSIGNMENTS OF ERROR.

The errors assigned in the record (p. 37) in the petition to Mr. Justice Lamar for the allowance of a writ of error from this court to the supreme court of the State of Texas are as follows:

> That a final judgment and decree in said suit aforesaid was so rendered on the 4th day of March, A. D. 1892, in said aforesaid supreme court of

Texas, being then and there the highest court of the State of Texas in which a decision in said aforesaid suit could be had; and further that the right and privilege and immunity of the said United States in said suit to be made a party under the Constitution, and set up and plead the right, title, and possession of the United States of America to the land sued for by the plaintiffs, was drawn in question in said suit, and the decision is against such title, right, privilege, and immunity, specially set up by defendants, and further that the title, right, privilege, and immunity claimed under the Constitution and laws of the United States by the United States to own, possess, and hold real estate in Texas, for military reservations under subdivision seventeen, section 8, article 1, of Constitution, and to set up in said suit title and right to hold such real estate for such purposes, and to defend suits brought against her soldiers in possession of said real estate, was drawn in question in said suit and decided against the United States; and further, that the validity of an authority exercised under the United States to hold real estate for a military reservation by defendants, and to set up, when sued, the title of the United States to such realty, was drawn in question in said suit and decided against defendants, all of which is error in said supreme court of Texas.

Wherefore, your complainants pray for a writ of error to said supreme court of Texas to remove said cause to the Supreme Court of the United States, to the end that said errors be corrected.

ARGUMENT.

The land in suit forms part of the United States military reservation at San Antonio, Texas, and has been used and occupied as a military post for a number of years, and the plaintiffs in error were, when sued and arrested, occupying it in the name of and by the authority and command of the United States.

There can not be a doubt that these officers and agents of the United States, thus in possession, were entitled to defend and justify that possession under and by virtue of any right or title that the United States had in the *locus in quo*. Nay, it was more than their right, it was their duty, thus to defend and justify under such right or authority.

The United States having been in the open, notorious, adverse possession of the land, it would seem proper that

it should have the protection of a prescriptive title by virtue of the laws of Texas, if an individual would be so entitled under the facts of this case.

Accordingly, the defendants claimed such prescriptive title in the United States by pleading that the plaintiffs' entry had been tolled by the three, five, and ten year statutes of limitation of the State of Texas.

The court of first instance, however, ordered these several pleas to be stricken out and the supreme court of the State affirmed that action.

The argument that these are no pleas for the United States because of an imaginary want of mutuality between it and the plaintiffs below, supposed to grow out of the Government's exemption from suit, has no application to this case, because, according to the fundamental theory of the plaintiff's case, an action against those in possession of the land would have lain for the plaintiffs at any time during the whole period of the adverse possession. During all that time there has been some one in possession to answer to the writ of any person claiming a better title.

Why then, it may be asked, did not the plaintiffs sue out their writ before the bar of the statutes attached?

But is there any well-founded reason why the United States should not have the *benefit* of a State statute of limitations? In other words, must the United States forego the benefits of such a statute because the statute can not be used to bar it?

The argument that the United States should not have the benefit of the statute against an individual because it can not be sued by him seems more specious than sound,

because the presumption of law is that no necessity to sue the Government can ever exist. The Government is presumed to be always ready to do justice to the citizen, and that presumption the law does not allow to be rebutted. Impeccability is an attribute of all governments.

Nor is it at all repugnant to the presumption that some governments establish courts to be sued in, for no coercive process is ever allowed to enforce the judgments and decrees of such courts, and citizens must rely, after all, on the honor of the government for satisfaction.

Hence, the presumption is not to be tolerated that if the plaintiffs had applied seasonably to the United States to recognize their rights, if any they had, justice would not have been done in the premises.

It is no argument that the United States can not recover interest because it can not be required to pay interest, nor is it any argument that the Government should not recover costs because it does not pay costs. The argument of want of mutuality does not prevail in such instances, although as applicable to them as to the statute of limitations.

The analogies of the law and the reason of the thing appear to be flatly against the argument based on want of mutuality.

Cases in this court are cited by the eminent counsel for the defendants in error to support his proposition that the United States can not have the advantage of a State statute of limitations, but these cases have no such bearing, for all that they decide is that the Government can not be *barred* by the plea of the statute. Indeed, these cases

seem to favor the opposite contention, for they all say that Government is not *bound or barred* by such statutes, but nowhere is it intimated that Government may not have the benefit of them. In every instance the court guardedly abstains from the least intimation that the converse of the rule laid down is not law.

The most that the eminent circuit justice ventured to say on this subject in the case of *San Francisco Sav. Union* v. *Irwin* (28 Fed. Rep., 708, 715) was that "we *doubt* very much whether the United States can acquire title by adverse possession against the right of a citizen."

Some of the royal prerogatives of England have become vested in the several States in the United States, because they inhere in the very conception of sovereignty. (*Van Brocklin* v. *Tennessee*, 117 U. S. R., 151.)

Mr. Chitty, in his work on the Prerogatives of the Crown, says, "The general rule *clearly* is, that *though the King may avail himself of the provisions of any act of Parliament*, he is not *bound* by such as do not particularly and expressly mention him" (p. 382).

The reasoning in support of the position here taken is strongly presented by Mr. Justice Paine in delivering the opinion of the supreme court of Wisconsin in the case of *Baxter* v. *The State* (10 Wis., 454, 456, 457). He says:

> This is an action on a contract between the plaintiff and the State, and is barred by the statute, unless there is some sufficient reason to deprive the State of the benefit of this plea. Is there any such reason? No satisfactory one was suggested on the argument, and none has occurred to us. Certainly none is to be derived from the maxim *Nullum tempus occurrit regi*, under which the king, and in this country the State, have been held not to be bound by the statute of limitations. This exemption was a part of the king's prerogative. The reasons of it are very fully stated in *United*

States v. *Hoar*, 2 Mason, 312, and also appear in Bacon's Abridgment, title, Prerogative. The rule established is that the statute can not be set up as a defense to an action by the king or the Government. But this being a matter of prerogative, founded upon the public good and the protection and preservation of the public interest, instead of furnishing any support for the position that, as a defendant, the State can not have the benefit of the statute, would fully sustain the opposite conclusion. It would be strange logic to say that because the State is privileged above other plaintiffs and can not be barred by the statute, therefore it shall not have an equal right with other defendants to avail itself of the benefits of the statute. We think it very clear that the whole reasoning upon which this rule rests sustains the conclusion that, as a defendant, the State is entitled to this defense.

The same also may be said of the general rule, that where a statute is general it shall not be construed as divesting or affecting any right of the king or the Government, unless expressly extended to them. This is also matter of prerogative, and the object of it is to give the rights of the king, or the state, a superior privilege or protection. It therefore furnishes no reason for saying that where the words of a statute are general, that the state can not avail itself of a right granted equally with other defendants. And the contrary conclusion is expressly recognized in those authorities which establish the rule. Thus in Bacon's Ab. Title Prerogative, E, 5, where the rule is stated, that the king is not bound by such general acts, a note is added, "but may *take advantage* of an act of parliament, though not particularly named." So in Coke, Part XI, 686, it is said, "as to the first it was objected that by the rule of the law, the king, not being named in the act, is by the law exempted out of the act, for the law gives the king the prerogative, that for the dignity of his royal person, he is not, by construction of the law, included within these common words, "person or persons, bodies politic or corporate," and be the statute affirmative, or be it negative, which is stronger, it shall not bind the king unless he is specially named, but *he shall take benefit of a statute though he be not named*," etc. The same principle also prevails in the rule by which the king or the state, though not liable to costs, yet receives costs. (18 John, 227.) These things show that the whole extent of the rule, excepting the state from the operation of general statutes, is only so far as it is for its benefit to be excepted, and for the purpose of giving it a superior right to ordinary parties. And this certainly would go to show that where the statutes give a right to defendants, the state is not to be deprived of it.

The case of *Rustomjee* vs. *The Queen* (L. R. 1, Q. B., Div. 487), relied on by the court below to support the view that the United States can not have the benefit of a statute of limitations in which it is not named, is no authority for the position, what fell from the chief justice on the subject being purely *obiter* and uncalled for, the case having

been decided on the point that the court had no jurisdiction to entertain the petition against the Queen.

Before concluding this branch of the case we take occasion to refer the court to *Gaines* v. *Hot Spring County* (39 Ark., 262, 263), and to *Lee* v. *Norris* (Cro. Eliz., 331).

THE FEDERAL QUESTION.

The defendants justified as officers of the U. S. Army. Gen. Stanley testified as follows: "I am a brigadier-general in the U. S. Army; my codefendants are officers in the U. S. Army. We took, held, and hold such possession as officers of the U. S. Army" (p. 16).

Here, then, is a commission held and an authority exercised under the United States, and the State court disregarded said commission and decided against said authority. The foundation of the defendants' justification was the prescriptive title of the United States under the several statutes of limitation of the State of Texas, which the State court refused to consider, *striking out the defendants' several pleas of limitation*, which does not look much like an immaterial or irrelevant defense, seeing that it went to the very root of the case.

But argument on the proposition is unnecessary, for if this court has no jurisdiction then the *Arlington Case* (106 U. S. R., 196) was removed from the State court of Alexandria County without authority of law. In that case Gen. Custis Lee sued Kaufman and Strong, officers of the U. S. Army, to recover possession of the Arlington estate. The case was removed by *certiorari* from the State court into the circuit court of the United States for the

eastern district of Virginia. If the authority of the United States, set up in that case, was a good basis for removing the case into the Federal court, why should not a precisely similar authority be a proper support to this writ of error?

It is respectfully submitted that there appears to be error in the record, which calls for a reversal of the judgment.

WM. A. MAURY,
Assistant Attorney-General.

IN THE

Supreme Court of the [illegible]

OCTOBER TERM, [illegible]

DAVID S. STANLEY and Others,
Plaintiffs in Error,

vs.

MARY U. SCHWALBY and Others.

In Error to the Supreme Court of the [illegible] Texas.

BRIEF FOR DEFENDANTS IN [illegible]

A. H. GARLAND
[illegible]

Press of McGILL & WALLACE, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

DAVID S. STANLEY and Others, Plaintiffs in Error,

vs.

MARY U. SCHWALBY and Others.

No. 1092.

In Error to the Supreme Court of the State of Texas.

BRIEF FOR DEFENDANTS IN ERROR.

Defendant in error, Mary U. Schwalby, joined by her husband, J. A. Schwalby, brought this suit February 23d, 1889, in trespass to try title in the District Court of Bexar County, Texas, against David S. Stanley and three other defendants, claiming title to lot 1, block 2, original lot 1, range 4, district 1, in San Antonia, Texas.

The suit was not brought against the commanding general or other officers as such. On December 2d, 1889, appellee, Schwalby, amended her petition claiming title to one-third only, but prayed for judgment for possession of the whole, alleging that defendants entered *without* any right or title. (Rec., 1 and 6–7.)

On the same day appellee, Joseph Spence, Jr., by leave of court, intervened, claiming title in himself to one-

third, and making the usual allegations in trespass to try title. This intervenor prayed judgment for the recovery of the title to one-third interest jointly with plaintiff, costs, etc. (Rec., 8.)

The defendants proper filed answers denying that they claimed title themselves in the lot sued for, but in the same instrument the United States of America, by her attorney, Andrew J. Evans, "by instructions of the Attorney-General of the United States" filed an answer claiming title, pleading the several periods of limitation and suggesting improvements in good faith.

Plaintiffs excepted to this answer in so far as the same purports to be filed for the United States, and excepted to the pleas of the United States setting up the statutes of limitations, etc. (Rec., 2–8.)

Exceptions to these pleas of limitations were sustained. Upon a trial of the cause on March 24th, 1890, the plaintiff and intervenor recovered judgment against all defendants for two-thirds of the land, and were awarded a writ of possession for the whole; but the United States were allowed improvements to the amount of $1,721. (Rec., 9, *et seq.*)

From this judgment all the defendants in the trial court appealed, and the plaintiffs also filed cross assignment (Rec. 26–29), and the case was carried to the Supreme Court of Texas, where the judgment of the District Court was reversed and set aside, and a judgment entered dismissing the United States as a party from the case, in favor of defendants in error against David S. Stanley, William R. Gibson, Samuel F. Cushing, and J. C. Bailey for the land sued for, and for the sum of two hundred dollars against these parties and their sureties, on their appeal bond, with interest at eight per cent. from March 24, 1890, till paid, with all costs incurred in that court and in the District Court. (Rec., 36.)

To review this judgment the United States brings the case here on error, but upon no precise assignment of error as yet disclosed, unless, perhaps, the assignment made in the Supreme Court of Texas (Rec., 26) may be so taken and considered; but that assignment by no means meets the exigencies of the case here.

The testimony in the case, about which there seems to be no dispute before this court, is to be found in the Record, pages 12–25, and for the purposes of this proceeding may be summarized thus:

It was agreed that Anthony M. Dignowity, was common source of title, and plaintiff and intervenor proved that Dignowity, through attorney, conveyed the lot in controversy to Duncan B. McMillan by deed of date May 9, 1860, which recited a consideration paid, contained clause of general warranty, and was duly acknowledged on the day it was executed, but was not recorded until September 30, 1889.

The death of McMillin was shown, and it was proved that only three children survive him, and that plaintiff is one of these and the vendor of intervenor another.

Dignowity died testate, and by the terms of his will, which was duly probated in 1875, his property passed to his widow, who, on May 1, 1875, by quit-claim deed conveyed the lot in controversy to the city of San Antonio, describing it as the lot "known as the McMillan lot."

The city of San Antonio conveyed this lot and other property conveyed by Mrs. Dignowity to it, to the United States by deed of date June 16, 1875. At the time the city of San Antonio bought from Mrs. Dignowity, she informed the mayor of the claim of McMillan, and refused to give other than a quit-claim deed to the lot.

The city donated the lot in controversy and other land to the United States, and the United States district attorney, whose duty it was made to examine the title before the donation was accepted, was informed of the convey-

ance to McMillan, but he testified that he satisfied himself that McMillan had not paid all the purchase money, and he therefore advised that the Government would get good title.

Supposing the United States properly in the case, for the present, she could plead no limitation under the Texas law as especially no tribunal was open for these parties to get relief as against her, and, therefore, it was quite right that her pleas of limitation were struck out.

Ang. Lim., secs. 39, 54, 63;
U. S. *v.* Insley, 130 U. S., 263;
U. S. *v.* N., C. & St. L. R. Co., 118 *Ib.*, 120;
U. S. *v.* Thompson, 98 *Ib.*, 486;
Dow *v.* Johnson, 100 *Ib.*, 158;
Lindley *v.* Miller, 6 Pet., 666.

This immunity from suit, enjoyed by the United States, does not protect her officers who commit trespass, and withhold illegally the possession of lands from rightful owners.

United States *v.* Lee, 106 U. S., 196.

Although the *Lee case* was hotly and stubbornly contested on every inch of the ground, and was decided at last by a bare majority, yet it has received since then the succor of several indorsements, if any were requisite.

Cunningham *v.* Macon, etc., 109 *Ib.*, 452;
Hans *v.* Louisiana, 134 U. S., 16;
In re Ayers, 123 *Ib.*, 501;
Pennoyer *v.* McConnaughy, 140 *Ib.*, 1.

And, following as a necessary consequence, the State Supreme Court properly held the United States could not be made a party in this suit in the absence of any act of Congress authorizing it—not even if the district

attorney had instructions to make her a party—which instructions do not, however, appear in the Record. (Cases *supra.*)

Carr *v.* U. S., 98 U. S., 433.

Which latter case was not interfered with as to this point in the *Lee case* (*supra*).

It is probable the instructions were to defend for these parties, who claimed to hold the land as United States officers in her name, and not to make the United States a party; but as held by the court, such instructions to make her a party if given would have been of no force. Therefore, the dismissal of the United States from the case was certainly correct.

This fully disposes of all question as to giving judgment for the United States for the value of improvements, because not being a party to the suit properly, no judgment for or against her could be legally rendered. But if the fact, as to the improvements were open for consideration here, it is not made out as a legal demand.

A possessor in good faith, suggesting improvements, is limited in his recovery to the amount in which the land recovered from him is actually increased in value, and if the improvements are of such a character as not to increase the value of the land no recovery should be had.

D. S. Stanley, one of the plaintiffs in error, testified that he would not swear that the lot in controversy was increased in value "one cent" by reason of the improvements upon it. On the contrary, if a man wanted the lot for a residence the improvements now upon it would be an incumbrance and would be worth next to nothing. The witness, in fixing value and cost of the houses, meant what it would cost the Government to replace the improvements considering the cost of lumber and labor. (Rec., 22.)

The same witness recalled, and George J. Kosters, in behalf of plaintiffs in error, testified that they did not know the actual value of the improvements; that their figures were based upon what it would cost the Government to replace the improvements at the time of the trial, considering cost of material and labor. Neither could say that the lot is actually increased in value by the improvements, which would be an incumbrance to a man who wanted the lot for a residence lot. (Rec., 2, 3.)

See Rev. Stats. of Texas, Art. 4814;
Sedgwick and Waite on Trial of Title to Land, section 669, p. 529;
Thomas *v.* Quailes, 64 Tex., 491;
Sedg. Dam. (2 ed.), 121 *et seq.*

A defendant in trespass, to try title, claiming the value of improvements alleged to have been made in good faith, will be charged with notice of the recitals of his chain of title, and if these advise him of the plaintiff's claim, and he refuses to make inquiry or investigate the merits thereof, his claim should not be sustained.

The deed from Amanda J. Dignowity to the city of San Antonio for the lot in controversy "releases and quit claims" to said city of San Antonio all her right, title, and interest in lot 1, block 2, *known as the McMillan lot.* (Rec., 18.)

J. H. French testified that he was mayor of San Antonio in 1875, when the city purchased the lot from Mrs. Dignowity; that the city had notice of the claim of the McMillans; Mrs. Dignowity refused to give a warranty deed; that the report of the special committee of the city council referred to this property. (Rec., 22.)

A. J. Evans testified that he is United States Attorney for the Western District of Texas; made an examination of the title to the lot in 1875; that he found no deed of record from Dignowity. He believed the title good and so advised the Department at Washington.

Cross-examined, the witness says: That he saw the deed from Mrs. Dignowity to the city and had notice of all its recitals; that he had information of the sale to Duncan B. McMillan, but that he satisfied himself that he had never fully paid the purchase money. The witness further stated, that when he saw from the deed that the lot in dispute was quit-claimed and described as being known as the McMillan lot, those facts did not create in his mind a suspicion that the title to the lot was not all right. (Rec., 22.)

Miller *v.* Brownson, 50 Tex., 583;
Johnson *v.* Schumacher, 72 Tex., 335;
House *v.* Stone, 64 Tex., 678;
Sedgwick and Waite (*sup.*), secs. 700–707, p. 536;
2 Kent Com., sec. 34, pp. 334–5 (Holmes, 13 ed.).

And the recovery of the improvements alleged to have been made in good faith should be limited to the amount in which the value of the property is actually increased by reason of such permanent improvements, and improvements made upon adjoining land should not enter into the calculation, though they became valueless if separated from those upon the land actually recovered. (See cases, *sup.*)

The sole witnesses for the plaintiff in error upon the issue of improvements, D. S. Stanley and Geo. J. Koster, gave a detailed statement of the character of the improvements upon the lot in controversy, consisting of two wooden houses of the cost of $500 each; one servant's house, cost, $300; three hundred and seventy feet of fencing, cost, fifty cents a foot, $185; one shed, cost, $250; one shed, cost, $100.

On cross-examination the witnesses stated that they did not know actual value of improvements. The basis of their figures was what it would cost the Government to replace the improvements at the time of trial, consid-

ering cost of material and labor. Neither witness could say that the lot is actually increased in value by these improvements; in fact, the improvements would be an incumbrance to a man who wanted the lot for a residence lot. The three hundred and seventy feet of fence *are* not wholly upon the lot; they are mainly in the street, *but would be* lost to the Government if the lot is taken away. The two wooden houses are in the same situation. They are situated two-thirds upon the lot and one-third upon what, formerly, was Pine street. The one-third on Pine street would be valueless if the two-thirds upon the lot were taken down. (Rec., 22–3.)

It only remains, then, to consider the question as to allowing defendants in error rents by way of damages. The record shows, beyond all cavil, these officers were trespassers, without even the plea of military or any other urgent necessity, and without any pretense of law authorizing them to hold this property. It would be an idle waste of time to argue this proposition. The list of cases already decided by this court places this beyond the domain of argument, especially as there is no means provided by Congress for compensation to parties suffering as defendants in error have done here.

Gibbons *v.* U. S., 8 Wall., 269;
Langford *v.* U. S., 101 U. S., 341;
Bates *v.* Clark, 95 U. S., 209;
Mitchell *v.* Harmony, 13 How., 128.

It is nowhere in the Record contended that the amount of the rents adjudged is unreasonable. On the contrary, from the testimony, the amount is quite fair and anything but excessive.

What is lacking in this brief, and doubtless there is much, will be supplied by attention to the lucid and cogent opinion of Chief-Justice Stayton, found in the Record, p. 30, *et seq.*

So much for the merits of the case upon the whole record.

But there is another view of this case to be presented to the court quite worthy of its consideration, and which must be fatal to the writ prosecuted herein.

What *Federal* question is shown in this Record? The jurisdiction in this court to review the decision of the Supreme Court of Texas must rest upon section 709, Revised Statutes. But where do we find any right or authority under the Constitution or statutes or treaties of the United States involved and decided against here? The only thing before us having even the semblance of a *Federal* question is the judgment dismissing the United States from the case. But it is not claimed she was put in the case by any authority or right under the Constitution or statutes or treaties, but solely on the order or direction of the Attorney-General, and that order appears not in the Record. Could this be done, then, in every case where a party who has a patent for land, or a patent for an invention, is brought into court the United States could be put in and made to contest the case with him, and a refusal of the court to permit it to be done could be examined into by this court. A *Federal* question means something more than this.

The general doctrine established by this court disposes of this most completely.

> Northern P. R. R. Co. *v.* Ellis, 144 U. S., 458;
> Giles *v.* Little, 134, *Ib.*, 645, and cases cited.

But there being no contest here as to any grant or title coming from the United States, but, at best, a mere assertion of an exercise of authority under the United States, the case comes directly under the rulings of this court in—

> Maney *v.* Porter, 4 How., 55;
> Wynn *v.* Morris, 20 *Ib.*, 3;

Millingar *v.* Hartupee, 6 Wall., 259;
Romie *v.* Casanova, 91 U. S., 379;
McStay *v.* Friedman, 92 *Ib.*, 723;
Hastings *v.* Jackson, 112 *Ib.*, 233.

Further than this, the mere assertion of this right did not present any question material or necessary to the decision of the case. The whole case, upon its merits, could have been disposed of without passing on this point. The decision of the Supreme Court of Texas rests upon ground broad enough to maintain the judgment without this question.

There is no judgment against the United States, but a judgment for possession of the land, with rent and costs against the individuals sued originally, and all this could stand outside and entirely independent of the other question.

Therefore, if even there be a *Federal* question in the Record, its decision not being necessary to a proper disposition of the real controversy, there is no case within the jurisdiction of the court.

144 U. S. (*supra*);
Hammond *v.* Johnston, 142 *Ib.*, 73;
and cases cited.

Wherefore, regardless of the merits of the case, it is most respectfully but most earnestly submitted, the writ of error should be dismissed for want of jurisdiction.

A. H. GARLAND,
For Defendants in Error.

NOTE.—After counsel for defendants in error in this court had been engaged in this cause, he saw a brief filed in the Supreme Court of Texas by Mr. Evans, U. S. District Attorney, in which this language is used: "*Under instructions from Attorney-General Garland, the United States of America made herself party defendant, and made full defense to the action,*" etc.

This is a mistake, as this case was begun on 23d February, 1889, only ten days before Mr. Garland quit the office of Attorney General (Rec., 1), and the first appearance of the United States in the case was on October 4th, 1889 (Rec., 2–4), just seven months after the end of his term of office.

But the following letter from the chief clerk of the Department of Justice, answering one from Mr. G. on the subject, makes this matter plain:

DEPARTMENT OF JUSTICE,
Washington, D. C.

Hon. A. H. GARLAND.

Dear Mr. Garland.—The case of Schwalby *et al. v.* Stanley seems to have reached this Dept. first, in April, 1889, by a letter of the 18th of that month from the Secy. of War requesting instructions to the U. S. Atty., W. D., of Texas, to defend Genl. Stanley.

This was after you had retired from office.

Yours truly,

CECIL CLAY.

This letter from the chief clerk (the original being in the hands of counsel for defendants in error) also explains the matter as to the appearance of the U. S. District Attorney at all in the case; that is as requested by the Secretary of War "*to defend General Stanley,*" and not to make the United States a party to the suit.

Respectfully,

A. H. G.

147 215 IN THE 525

Supreme Court of the United States,

OCTOBER TERM, 1892.

IN THE MATTER

of the

PETITION OF THE HABERMAN MANUFACTURING COMPANY FOR A WRIT OF MANDAMUS ON THE JUDGES OF THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, COMMANDING THEM TO APPROVE AND DIRECT THE FILING OF A SUPERSEDEAS BOND IN AN AMOUNT SATISFACTORY TO THEM IN CONNECTION WITH AN APPEAL FROM A CERTAIN INTERLOCUTORY DECREE OF SAID COURT, GRANTING AN INJUNCTION, AND TO VACATE THE INJUNCTION GRANTED UNDER SAID INTERLOCUTORY DECREE.

PETITION FOR WRIT OF MANDAMUS.

W. H. KENYON,
Attorney for Petitioner.

NEW YORK:
JOHN POLHEMUS PRINTING CO., Printers and Mf'g Stationers, 121 Fulton Street.
1893.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1892.

IN THE MATTER

of

The Petition of the HABERMAN MANUFACTURING COMPANY for a Writ of Mandamus on the Judges of the Circuit Court of the United States for the Southern District of New York, commanding them to approve and direct the filing of a supersedeas bond in an amount satisfactory to them, in connection with an appeal from a certain interlocutory decree of said Court, granting an injunction and to vacate the injunction granted in accordance with said interlocutory decree.

Petition for Writ of Mandamus.

To the Honorable, the Justices of the Supreme Court of the United States.

The petition of the Haberman Manufacturing Company, a corporation organized and existing under the laws of the State of New Jersey, and having a place of business in Berlin Village in the State of New York respectfully represents:

That on the 8th day of September, 1891, a bill in equity was filed by the Lalance & Grosjean Manufacturing Company, a corporation organized and existing under the laws of the State of New York, against your petitioner, defendant, in the United States Circuit Court for the Southern District of New York for the alleged infringement of United States Letters Patent No. 279,094, granted to Emile Kegreisz on June 5th, 1883, for an improved process of manufacturing enameled iron ware.

That an answer was duly filed by your petitioner in said suit, and issue joined and testimony taken and a hearing had thereon with the result that on the 22d day of December, in the year 1892, the Court rendered a decision sustaining the patent in suit and directing the entry of the usual decree for an injunction and an accounting.

That on the 4th day of January, 1893, at the time of the settlement of the decree in said suit, your petitioner, being prepared to take an appeal at once to the Circuit Court of Appeals for the Second Circuit from such decree and being advised by its counsel that under the provisions of Section 7 of the Act of March 3, 1891, regulating appeals from interlocutory decrees granting an injunction, it was entitled as a matter of right to a stay of the injunction pending such appeal, made application to the Court amongst other things for a stay of the injunction pending an appeal, and for the acceptance and approval of a supersedeas bond in such sum as the Court should fix to indemnify the complainant for any damages resulting from said stay, and for leave to file the same and offered to file such a supersedeas bond satisfactory to the Court, insisting before said Court that the defendant was entitled to a stay as of right, the appeal bond being satisfactory to the Court.

That the Court denied said application, and rendered an opinion holding that "The rule as enunciated in Pasteur vs. Blount, 51 Fed. Rep. 610 is not as I understand it the law of this Circuit," as by a copy of said opinion hereto annexed will appear.

That on the 5th day of January, 1893, a decree was entered awarding a perpetual injunction and directing an accounting.

That on the 5th day of January, 1893, an injunction was issued pursuant to said decree and on the 6th day of January, 1893, was served upon your petitioner.

That on the 7th day of January, 1893, your petitioner made application in due form for the allowance of an appeal from said interlocutory decree, to the Circuit Court of Appeals for the Second Circuit and that an appeal was duly allowed. That in connection with its appeal your petitioner filed in the office of the Clerk of said Court a bond duly approved to cover the costs of said appeal, and an assignment of errors. That the petition on appeal and the citation were served upon the complainant, together with a copy of the bond and of the assignment of errors on January 7th, 1893, and the said petition on appeal and citation were filed in the Clerk's office on January 9th, 1893.

That on the 20th day of January, 1893, after the said appeal was perfected and within thirty days of the entry of the said interlocutory decree your petitioner, still insisting upon its right to a supersedeas upon appeal, presented to said Court a supersedeas bond to the complainant, duly executed with two sureties in the sum of ten thousand dollars ($10,000) to indemnify the complainant for all damages resulting from such supersedeas of the injunction, and further offered to file a supersedeas bond in any amount satisfactory to the Court, that thereupon the Court made an order, a copy of which is hereto annexed, thereby refusing to your petitioner a supersedeas of the injunction pending said appeal upon the ground set forth in said opinion to the effect that it was not the law of the second Circuit that the defendant has a right to a supersedeas of the injunction pending the appeal upon offering and furnishing a supersedeas bond for the protection and indemnity of the appellees and

satisfactory to the Court for that purpose. A copy of the bond presented to the Court on the said 20th day of January, 1893, is hereto annexed.

That all said proceedings took place at the October Term, 1892, of said United States Circuit Court, for the Southern District of New York, which began on the third Monday of October, 1892, and has not yet expired.

That your petitioner being without further remedy in the premises, now prays your Honorable Court that the Writ of Mandamus be issued out of this Court directed to the Judges of the said Circuit Court for the Southern District of New York, commanding them to approve and direct the filing of a supersedeas bond in such amount as the Court shall fix to supersede the injunction, and to enter an order vacating, suspending or superseding the injunction theretofore granted, all as prayed for.

That your petitioner annexes hereto a certified copy of the bill of complaint in said suit, and the answer, and replication, of the interlocutory decree, of the opinion of said Court upon your petitioner's first application for a stay, of the petition on appeal, citation, and bond for costs, and of the order of the Court entered on January 21, 1893, denying the petitioner's motion. Your petitioner also annexes hereto a copy of the supersedeas bond presented to the Court on Jan. 20, 1893.

The Haberman Mfg. Co.

By Louis Haberman Pres.

H. H. Kenyon

Attorney for Petitioner

STATE OF NEW YORK,
City and County of New York. } ss.:

LOUIS HABERMAN being duly sworn, deposes and says, that he is the vice president of the Haberman Manufacturing Company, the petitioner above named, and that the facts stated in the above petition are true, except those stated on information and belief, and as to them, he believes the same to be true.

LOUIS HABERMAN.

Subscribed and sworn to before me, this 21st day of January, 1893.

Henry D. [illegible]
Notary
City and [illegible]

(Seal)

Supreme Court of the United States

OCTOBER TERM, 1892.

IN THE MATTER

of the

PETITION OF THE HARBERMAN MANUFACTURING COMPANY FOR A WRIT OF MANDAMUS ON THE JUDGES OF THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, COMMANDING THEM TO APPROVE AND DIRECT THE FILING OF A SUPERSEDEAS BOND IN AN AMOUNT SATISFACTORY TO THEM IN CONNECTION WITH AN APPEAL FROM A CERTAIN DECREE OF SAID COURT, AND TO VACATE THE INJUNCTION GRANTED UNDER SAID DECREE.

BRIEF IN SUPPORT OF MOTION

For Leave to File Petition for Writ of Mandamus and for a Rule to Show Cause.

W. H. KENYON,
Attorney for Petitioner.

C. E. MITCHELL,
Of Counsel.

NEW YORK:
JOHN POLHEMUS PRINTING CO., Printers and Mf'g Stationers, 121 Fulton Street.
1892.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

IN THE MATTER

of

The Petition of the HABERMAN MANUFACTURING COMPANY for a Writ of Mandamus on the Judges of the Circuit Court of the United States for the Southern District of New York, commanding them to approve and direct the filing of a supersedeas bond in an amount satisfactory to them, in connection with an appeal from a certain decree of said Court, and to vacate the injunction granted in accordance with said decree.

Motion for leave to file petition for writ of mandamus and for a rule to show cause.

Now comes the Haberman Manufacturing Company, the petitioner herein, by its attorney, and moves this Honorable Court for leave to file the accompanying petition for a writ of mandamus and for a rule on the Judges of the Circuit Court of the United States for the Southern District of New York,

requiring them to show cause on or before a certain date, to be named in said rule, why the writ of mandamus should not be granted as prayed.

Brief in support of above motion.

1. Statement of the question.

The petition which this motion asks leave to file involves the question whether upon an appeal in a patent suit taken to the United States Circuit Court of Appeals pursuant to the seventh section of the Act of Congress, of March 3, 1891, from an interlocutory decree granting an injunction, the defendant and appellant is entitled as a matter of right to a supersedeas of the injunction pending the appeal.

The seventh section of the act of March 3, 1891, reads as follows:

> "Sec. 7. That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this Act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the Circuit Court of Appeals: *Provided*, That the appeals must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the Appellate Court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal."

The suit against this petitioner in the Circuit Court of the United States for the Southern District of New York is one for the infringement of a patent, and is therefore "a cause in which an appeal from a final decree may be taken * * * * to the Circuit Court of Appeals."

An interlocutory decree granting an injunction was entered in this suit on the 5th day of January, 1893. An injunction was issued on that day and served upon the petitioner on the following day, January 6th, 1893.

On the following day, Jan. 7th, 1893, an appeal was taken in due form to the Circuit Court of Appeals from this interlocutory decree. At the time such appeal was taken, a bond to cover the costs of the appeal was approved and filed.

On January 4th, 1893, at the time of the settlement of the decree, the petitioner moved the Court amongst other things for a stay of the injunction pending the appeal about to be taken and for the acceptance and approval of a supersedeas bond for that purpose and offered to file such a supersedeas bond in any sum the Court might fix. This motion was denied, the Court delivering an opinion to the effect amongst other things that upon such an appeal the defendant is not entitled as a matter of right to a supersedeas of the injunction.

The Court expressed its opinion in the following language:

> "The rule as enunciated in Pasteur vs. Blount, 51 Fed. Rep. 610, is not as I understand it, the law of this Circuit."

On January 20th, 1893, after the appeal had been perfected, the petitioner applied to the Court for the approval of a supersedeas bond in such amount as the Court should fix to supersede the injunction and presented to the Court at that time a supersedeas bond duly executed with two sureties in the sum of ten thousand dollars.

This application was denied, the Court at that time making an order, denying the previous application of the petitioner for a stay and for the approval and filing of a supersedeas bond.

This order was entered on January 21, 1893.

We submit that under the provisions of section seven of the act of March 3, 1891, the Court had no discretion to refuse to accept or approve such a

supersedeas bond satisfactory in amount and as to sureties, or to refuse to stay or vacate or supersede the injunction upon the filing of such bond.

Section 7 of the act of March 3, 1891, gives to a defendant taking an appeal under that section from an interlocutory order or decree granting an injunction, an absolute right to a supersedeas of the injunction pending the appeal, upon the filing of a bond satisfactory to the Court.

2. This is the plain meaning of the language of this section.

It has been so decided by Judge Jackson, Circuit Judge for the Fifth Circuit, in the case of *Societe Anonyme du Filtre et al. vs. Blount et al.*, 51 Fed. Rep., 610. Judge Jackson in his opinion says:

> "The motion to vacate and set aside the supersedeas heretofore allowed the defendant Blount is denied. Under the seventh section of the act of March 3, 1891, said defendant had the right to appeal from the order of the Circuit Court granting the injunction and to make such appeal effectual he had a right to the supersedeas upon such terms as the Court or Judge granting it might impose. In the prosecution of an appeal under that section, there is no discretion in the Court or Judge allowing the same to deny or refuse the appellant a supersedeas. There is a discretion in respect to the bond that may be required of the appellant for the protection and indemnity of the appellees. Any other construction of said section would defeat the very aim and purpose of its enactment—the previous practice and legislation in relation to appeals and their effect render it very clear that the appeal allowed by said section was intended to suspend and vacate the order granting the injunction. The motion to vacate and set aside the supersedeas is denied."

Judge Jackson's opinion is supported and enforced by a consideration of the language of this section, the evident purpose of its enactment, and the previous practice and legislation which it was designed to supersede.

The language of this section of the statute shows unmistakably that a party taking an appeal from an interlocutory order or decree granting an injunction, is entitled as a matter of right to a *supersedeas*. The section says that such an appeal may be taken "provided that the appeals must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings *in other respects* in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal." We have underlined the words "in other respects" because they seem to us to indicate clearly the proper construction of this section. When the statute says that the proceedings "in other respects" shall not be stayed unless otherwise ordered, it plainly means or implies that the proceedings *in some respect* shall be stayed as a matter of course or of right. The distinction is drawn between different parts of the proceedings in the lower court, the statute clearly meaning or implying that as to one part of those proceedings there shall be a stay, while as to the other part of the proceedings, or "in other respects" there shall not be a stay unless otherwise ordered.

What was the respect in which there was to be a stay as a matter of right? It was evidently the issuance of the injunction which was to be stayed in any event. The whole force of this section is directed to the feature of the granting or continuing of an injunction. This was the one characteristic of the order or decree which made such order or decree appealable. When the section therefore provides that in some respect there was to be a stay, it was evidently referring to that part or feature of

the order or decree which brought it under the special provisions of this section, to wit, to that part of the order or decree granting the injunction. The proceedings under the order or decree were to be stayed so far as the granting of the injunction was concerned, as a matter of right, but "in other respects" the question was left to the discretion of the lower court.

Any other construction of this section would make the words "in other respects" meaningless and superfluous. It is a well-recognized rule of construction of statutes that where one construction would give force and effect and purpose to every part of the language of the statute, whereas a different construction would make a certain part of the statute meaningless and superfluous, the former construction must be adopted.

If Congress had intended to provide that the staying of the proceedings in the lower court should rest entirely within the discretion of that court both as to the granting of an injunction and as to other matters, the statute would have said simply that "the proceedings in the court below shall not be stayed unless otherwise ordered." This would have meant all the proceedings, and would have drawn no distinction between the granting of the injunction and the taking of the account. But the statute does not say this, but expressly limits the questions as to which the Court can exercise its discretion by the words "in other respects." *In some respect* the Court was to have no discretion, but there was to be a stay as a matter of course. This respect was evidently the granting of the injunction.

The appeal under this section was intended primarily to bring up for review in the higher court that part of the decision or decree of the lower court which directed the issuance of an injunction.

It may be true that when the Court of Appeals once takes jurisdiction of the case for this purpose, it has jurisdiction of it for all other purposes, and may review other parts of the order or decree ap-

pealed from. But the main object of the appeal was to review that part of the order or decree which granted the injunction. For the purposes of the appeal, the order or decree was to be considered merely as an order or decree for an injunction. The section provides therefore that so far as the order or decree grants an injunction, or in other words to just the extent to which the order or decree has been appealed from, the execution or enforcement of the decree in the lower court shall be stayed. This was to prevent what would otherwise be in the nature of execution before judgment.

It is clear that section seven provides that there shall be a stay in some respect. If the injunction is not stayed, there is no stay of proceedings in any respect. An appeal itself is not a stay of proceedings, and never has been so termed either in the statutes or the cases.

3. That it was the intention of Congress that the injunction should be stayed pending the appeal, is shown by the particular form of expression adopted in this section.

The section says that "the proceedings in other respects in the Court below shall not be stayed," thereby necessarily meaning "that the proceedings in some respect shall be stayed."

The phrase or expression, "the proceedings shall be stayed" or "the stay of proceedings" is shown by an examination of the statutes and cases to have a recognized and well-established meaning. It has always been used in connection with appeals and writs of error to refer to the suspension of execution under a judgment or the suspension of the enforcement of a decree. The mere taking of an appeal and the transferring of a case by such appeal from a lower to a higher Court has never been termed a stay of proceedings. The taking of an appeal is one thing, the staying of proceedings is quite a distinct thing. An appeal, generally speaking, may or may not be accompanied with a stay of proceedings; depending upon the special provisions

of law relating thereto and upon whether the appellant avails himself of those provisions, as for example, by filing a sufficient bond within the time prescribed.

Thus in Kitchen *vs.* Randolph, 3 Otto 86, the Supreme Court uses these words "stay of proceedings" to refer to a stay of execution.

It says:

> "The *stay of proceedings* followed as a matter of right from the issue and service of the writ of error, in the manner and within the time prescribed by the Act."

Again in speaking of the effect of the issuance of an execution it says:

> "But, if one should issue and a supersedeas be thereafter perfected that would only operate *to stay further proceedings* under the execution, and could not interfere with what had already been done."

Here the same words were used to refer to the suspension of execution.

In the same case, the Court again uses these words as follows:

> "In this way the old rule requiring promptness of action to obtain a *stay of proceedings* was substantially abandoned."

Here the words are used in the same sense.

In Hogan *vs.* Ross, 11 Howard 297, the Supreme Court says:

> "For the Court is unanimously of the opinion that in the exercise of their appellate power they are not authorized to award a supersedeas *to stay proceedings* on the judgment of the inferior court, upon the ground that a writ of error is pending unless the writ was sued out within ten days after the judgment, etc."

Here the words "to stay proceedings" are used to refer to the enforcement of the judgment.

The Act of 1872, 17 Stat. at L. 198, Sec. 11, provided:

> "That any party or person desiring to have any judgment, decree, or order of any district or circuit court reviewed on writ of error or appeal, and *to stay proceedings* thereon during the pendency of such writ of error or appeal, may give the security required by law therefore within sixty days after the rendition of such judgment, decree, or order, or afterward, with the permission of a justice or judge of the appellate court."

Here the words "to stay proceedings" are used in the same sense.

In Bouvier's Law Dictionary the word "Supersedeas" is defined as

> "The name of a writ containing a command *to stay the proceedings* at law."

It must be presumed that when Congress chose these particular words it intended that they should have the same meaning they had always had in previous statutes and decisions. It must be held therefore, that when Congress provided in this way that there should be a stay of proceedings in some respect, it meant that in some respect there should be a supersedeas or its equivalent, that is to say, that there should be a stay of the enforcement of the order or decree as to some part of such order or decree. The only proceeding which Congress could have had in mind as the one to be stayed was the granting of the injunction.

4. The conditions and regulations prescribed by Section 7 in reference to an appeal from an interlocutory order or decree, also confirm the view herein contended for, that the appeal was to operate as a stay of the injunction.

The statute provides that such appeal must be taken within thirty days. This part of the statute has no special meaning unless the statute intended

that pending the appeal the injunction should be stayed. This clause was certainly not intended for the benefit of the defendant. It was a restriction upon the defendant's rights. It must then have been intended as a benefit to the complainant, to save the complainant from some hardship or injury that would otherwise result to it. The only hardship or injury that could result to a complainant from the postponement of the appeal would be in case the injunction was suspended during the appeal. If the injunction was not suspended, the delaying of the appeal would work no hardship to the complainant but, on the contrary, would benefit the complainant by giving him the monopoly of the business during a longer period of time. Evidently this limitation of the defendant's time to appeal was put into the statute as a result of the very fact that, under the statute, the defendant was entitled to an absolute stay of the injunction pending the appeal, and it was therefore only just to make the defendant push his appeal with all possible speed.

An examination of the previous practice and legislation in this country upon the subject of appeals and writs of error, shows that the only cases in which a short period of time such as ten or thirty or sixty days was prescribed as the limit of time within which an appeal should be taken or a writ of error sued out or security filed, were cases in which the appeal or writ of error was to operate in some respect as a stay of the enforcement of the judgment or decree in the lower court.

The act of 1789 (1 Stat. at L., 85, Sect. 23) provided that a writ of error should be a supersedeas, and stay execution only in cases where the writ of error was served and a copy thereof lodged for the adverse party in the Clerk's office where the record remained, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of.

The same regulation was applied to appeals in equity by the act of 1803 (2 Stat. at L., 244, Sect. 2).

In 1872, the time within which an appeal could be taken so as to operate as a supersedeas was extended to sixty days (17 Stat. at L., 198, Sect. 11).

By section 1007 of the Revised Statutes, as amended, the time within which a writ of error could be sued out so as to operate as a supersedeas was again limited to ten days. The same rule applied of course to appeals (Revised Statutes, sections 1007 and 1012; 18 Stat. at L., 318).

When Congress limited the time of appeal from an interlocutory order or decree, granting an injunction, to thirty days, it is natural and reasonable to conclude, in view of the former practice, that it adopted this limitation for the same reason that such limitations had been previously adopted, namely, because the appeal was to operate as a supersedeas.

It has always been a recognized principle of practice, that where the right to a supersedeas or a stay of proceedings was to follow an appeal or a writ of error, that right must be exercised with great promptness, and the law has always strictly and narrowly limited the time within which such right could be exercised. In the case of Sage *vs.* Central R. R. Co., of Iowa, 3 Otto, 412, the Supreme Court in speaking of a supersedeas said:

"Time is an essential element in the proceeding, and one which neither the Court nor the Judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement."

The Supreme Court was of course speaking in this connection of a supersedeas under the United States Statutes, but it has always been equally true in reference to a supersedeas or stay of proceedings that "time is an essential element in the proceeding."

The fact that Congress limited the time for an appeal under the seventh section to thirty days is

therefore a strong indication that the appeal was to operate as a stay of the injunction.

It is also significant that the statute provides that such an appeal shall have precedence in the Court of Appeals. This provision was for the purpose of securing a speedy hearing and decision in the Court of Appeals to the end that the stay of the injunction in the lower court might not be prolonged so as to deprive the complainant of the benefits of the decree in the lower court for any great length of time if the decision of the lower court was finally affirmed.

5. The purpose of the enactment of this statute was to give to a defendant against whom an injunction had been granted, the right of an immediate appeal accompanied by a stay of the injunction to the end that the defendant's business should not be stopped until the question of the propriety of the in junction should first be passed upon by the Court of Appeals.

In the case of Jones Co. et al v. Munger Co., 50 Fed., Rep. 785, decided July 26, 1892, the Circuit Court of Appeals for the Fifth Circuit, in speaking of the seventh section of this act, said as follows:

"An allowance of an appeal from an interlocutory order or decree, granting or continuing an injunction in an equity cause under the seventh section of the Judiciary Act of 1891, is a new feature of the practice in the United States Courts. *Being of a highly remedial nature, it ought to be construed so as to give full force to the intention of the law maker.* The mischief to be remedied by the act was that injunctions which deprived parties of the possession and control of property, or compelled enforced action in the use of property were, under the practice of the courts, frequently rendered long before the final hearing in the case, and operated, to a great extent, in the nature of execution before judgment. This mischief was as great in patent cases, where

parties on hearings preliminary to the final decree were enjoined pending long and tedious examinations in the matter solely of accounting, as in any other cases of preliminary injunction."

Under the practice formerly prevailing it often happened that an injunction was granted upon an interlocutory order or decree especially in patent causes, which entirely stopped the defendant's business pending a long accounting and a subsequent appeal, and which, for this reason, destroyed that business and perhaps financially ruined the defendant, although upon the appeal the decree was afterwards reversed and it was held by the higher court that the injunction should not have been granted. Great hardship resulted from the fact that there was no right of a speedy appeal from such a decree which would operate as a stay of the injunction pending the decision upon appeal. The injury which was likely to result to a defendant under this former practice, was very much greater than any possible injury that could result to a complainant by reason of the staying of the injunction pending a prompt appeal. Where the injunction is stayed for the purposes of the appeal the Court has the power to indemnify the complainant from any injury resulting from said stay by requiring the defendant to file a bond in any sum that the Court may think necessary for that purpose, or to deposit such amount in Court as will indemnify the complainant if, upon appeal, the decision of the lower Court is sustained.

It was in view of the fact that greater injury was likely to result to litigants from the improvident granting of injunctions than from the staying of such injunctions pending a speedy appeal, that Congress chose to change the practice by giving a right of appeal from interlocutory orders or decrees granting an injunction and providing that such an appeal should have the effect of superseding the injunction upon the filing of proper security.

The history of the practice upon appeals and

writs of error in this country and in England will show, as we believe, that this seventh section was enacted by Congress with the purpose of giving to the defendant a supersedeas of the injunction pending the appeal in order to establish what seemed to Congress the wisest and most reasonable rule of procedure in such cases.

Prior to 1772 in the English Chancery practice appeals could be taken to the House of Lords from interlocutory orders or decrees of the Chancellor, and such appeals operated as a stay of the entire proceedings in the lower court, including not only the proceedings in reference to the subject-matter of the appeal, but all the proceedings in the case of any nature whatsoever.

In 1772 it was decided in the case of Lord Pomfret *v.* Smith by Lord Apsley that the jurisdiction of the Court of Chancery in such a case was suspended only as to the matter appealed from, but that it was not totally suspended so as to prevent a proceeding as to any other matter in the cause. (See Hovey *v* McDonald, 109 U. S. 160, and Hart v. Mayor, 3 Paige, 383.)

From 1772 until 1807 it seems to have been the rule that upon such an appeal from an interlocutory order or decree the proceedings in the lower court were stayed in reference to the subject-matter appealed from, but not in other respects.

In 1807 the House of Lords adopted a rule that the proceedings in the lower court upon such an appeal should not be stayed, but that it should be within the discretion of the Chancellor to stay the proceedings pending the appeal or not, according to the circumstances of the case. The reason for this change in the rule was because the number of appeals to the House of Lords had so increased and the delay attendant upon such appeals was so great, that it was felt to be a great inconvenience and injustice to deprive the successful party in the lower court of the benefit of its decree for so long a time.

The practice established by Section 7 of the pres-

ent act is an adoption of this former practice of the English Court of Chancery, but with such provisions, to wit, that the appeal must be taken within thirty days and that the case shall be preferred in the Court of Appeals, that the inconvenience and injustice inherent in this practice as it prevailed in England at the beginning of this century has been done away with.

In other words Congress in adopting the practice of the English Court of Chancery in the matter of allowing appeals from interlocutory orders or decrees, has chosen to adopt the rule as to a stay of proceedings upon such an appeal which was followed between the years 1772 and 1807, being careful to avoid what were recognized as the defects or imperfections in that practice by providing first for a speedy appeal, and secondly, for the speedy hearing of that appeal.

This view is further confirmed by another consideration. It was evidently the understanding of those who drew this statute, that unless some provision was made to the contrary, the taking of an appeal would operate as a supersedeas staying the entire proceedings in the lower court. Otherwise there would have been no necessity for providing in the statute that the proceedings shall not be stayed unless otherwise ordered. The only reason that Congress could have had for putting in this last clause of Section 7, was to prevent the appeal from operating as a stay of all proceedings in the lower court. Congress desired to make the question of a stay of the proceedings other than the enforcement of the injunction, one for the lower court to decide in its own discretion. When, therefore. this clause was drawn, it was carefully limited so as not to give the lower court discretion as to every part of the proceedings, but to leave the staying of the injunction beyond the discretion of the court and an absolute right on the part of the defendant.

If it be said that there are some exceptional cases in which hardship would be wrought by a stay of proceedings pending a short appeal, the reply is

obvious that if the language of the statute is plain, the remedy is to be sought in Congress and not in the Courts.

But we submit that the resources of Courts of Equity are sufficient to enable them to do justice without enforcing injunctions where a satisfactory supersedeas bond is given, pending an appeal taken within a very limited time to a Court which is commanded to give such a case a preference.

6.—The jurisdiction of this court to entertain the present application is founded upon Section 688 of the United States Revised Statutes. The Circuit Court of Appeals for the Second Circuit would not apparently have jurisdiction to entertain the present application. Its jurisdiction is solely that which is conferred upon it by the act of March 3, 1891. That act does not confer upon the Circuit Courts of Appeals any original jurisdiction, but solely appellate jurisdiction and does not confer upon those courts any right to issue writs of mandamus except such as are "necessary" to the exercise of the conferred appellate jurisdiction. Section 716 United States Revised Statutes. The latter section which is made a part of the law of March 3, 1891, has been construed as conferring no right to issue a mandamus as an original proceeding, but only as ancillary to some other proceeding or right of which it has jurisdiction.

McEntire *vs.* Wood, 7 Cranch, 504.

The present application raises a question, the decision of which is not necessary to the appellate jurisdiction of the Circuit Court of Appeals for the Second Circuit in the case referred to in the petition.

We therefore submit that the petition for a mandamus should be granted and a rule to show cause entered returnable on such date, as the Court shall fix.

W. H. KENYON,
Attorney for Petitioner.
C. E. MITCHELL,
Of Counsel.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1892.

IN THE MATTER

of the

PETITION OF THE HABERMAN MANUFACTURING COMPANY FOR A WRIT OF MANDAMUS ON THE JUDGES OF THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, COMMANDING THEM TO APPROVE AND DIRECT THE FILING OF A SUPERSEDEAS BOND IN AN AMOUNT SATISFACTORY TO THEM IN CONNECTION WITH AN APPEAL FROM A CERTAIN DECREE OF SAID COURT, AND TO VACATE THE INJUNCTION GRANTED UNDER SAID DECREE.

TRANSCRIPT OF RECORD ANNEXED TO PETITION.

W. H. KENYON,
Attorney for Petitioner.

NEW YORK:
JOHN POLHEMUS PRINTING CO., Printers and Mf'g Stationers, 121 Fulton Street.
1893.

Circuit Court of the United States.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LALANCE & GROSJEAN MANUFACTURING COMPANY

vs.

HABERMAN MANUFACTURING COMPANY.

In Equity.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York.

LALANCE & GROSJEAN MANUFACTURING COMPANY, a corporation duly incorpoaated under the laws of the State of New York in said State brings this its Bill of Complaint against HABERMAN MANUFACTURING COMPANY, which is, as your orator is informed and believes, a corporation organized under the laws of the State of New Jersey and having an office at New York, in the Southern District of New York, and thereupon your orator complains and says:

That one Emil Kegreisz was and is the original and first inventor of certain new and useful improvments in Manufacture of Enameled Iron Ware, fully described in the Letters Patent hereinafter mentioned, and which had not been known or used before said Emil Kegreisz's said invention, and which was not for two years before his application for patent, as hereinafter mentioned, in public use, or on sale.

And your orator further shows unto your Honors that said Emil Kegreisz having before the issuance of the Letters Patent hereinafter mentioned made an assignment in writing of all his interest in and to said invention and Letters Patent to your orator, which assignment

Circuit Court of the United States.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LALANCE & GROSJEAN MANUFACTURING COMPANY *vs.* HABERMAN MANUFACTURING COMPANY.	In Equity.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York.

LALANCE & GROSJEAN MANUFACTURING COMPANY, a corporation duly incorpoaated under the laws of the State of New York in said State brings this its Bill of Complaint against HABERMAN MANUFACTURING COMPANY, which is, as your orator is informed and believes, a corporation organized under the laws of the State of New Jersey and having an office at New York, in the Southern District of New York, and thereupon your orator complains and says:

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And your orator further shows unto your Honors that said Emil Kegreisz having before the issuance of the Letters Patent hereinafter mentioned made an assignment in writing of all his interest in and to said invention and Letters Patent to your orator, which assignment

was duly recorded in the Patent Office, and being so as aforesaid the first inventor and discoverer of said improvement in Manufacture of Enameled Iron Ware, your orator did, on June 5, 1883, upon due application therefor, obtain Letters Patent of the United States for said invention, in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents of the United States, bearing date the day and year last aforesaid and numbered 279,094, whereby there was granted and secured to your orator, its successors or assigns, or intended so to be, for the term of 17 years, from and after the date of said Letters Patent, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention and improvements, as set forth in said Letters Patent, which or a duly certified copy of which is ready here in Court to be produced; and by virtue whereof your orator became and now is the sole owner of all the rights and privileges granted and secured, or intended to be granted and secured, in and by said Letters Patent.

And your orator further shows unto your Honors that, by virtue of the premises, your orator became and now is the sole and exclusive owner of said Letters Patent, and the inventions and improvements described therein, and of all the rights and privileges granted and secured, or intended to be granted and secured thereby. And that since it became the owner thereof as aforesaid, it has invested and expended large sums of money, and has been to great trouble in and about said invention, and for the purpose of carrying on the business of making and selling the said Manufacture of Enameled Iron Ware, and making the same profitable to itself and useful to the public; and that said invention has been, and is, of great benefit and advantage; and that large quantities of said Manufacture of Enameled Iron Ware were made according to said invention and sold by your orator to the great advantage of the public; and that the public have generally acknowledged and acquiesced in the aforesaid rights of your orator, and your orator believes that it will

realize and receive large gains and profits therefrom, if infringements by said defendant and its confederates shall be prevented.

Yet the said defendant well knowing the premises and the rights secured to your orator as aforesaid, but contriving to injure your orator, and to deprive it of the benefits and advantages which might, and otherwise would, accrue unto it from said invention, after the issuing of the Letters Patent as aforesaid, and before the commencement of this suit, but how long before your orator does not know, did, as your orator is informed and believes, without the license or allowance, and against the will of your orator, and in violation of your orator's rights, and in infringement of the aforesaid Letters Patent, at New York in the Southern District of New York and at other places, unlawfully and wrongfully, and in defiance of the rights of your orator make, construct, use and vend to others to be used, the said invention, and did make, construct, use and vend to others to be used, Manufacture of Enameled Iron Ware made according to, and employing and containing said invention; and your orator charges it to be a fact that said defendant and its confederates still continue so to do; and that they are threatening to make the aforesaid Manufacture of Enameled Iron Ware in large quantities, and to supply the market therewith, and to sell the same.

All in defiance of the rights acquired by and secured to your orator as aforesaid, and to your orators great and irreparable loss and injury, and by which your orator has been and still is being deprived of great gains and profits which it might and otherwise would have obtained, but which have been received and enjoyed, and are being received and enjoyed, by the said defendant by and through its aforesaid unlawful acts and doings.

And your orator further shows unto your Honors, on information and belief, that said defendant has made and sold and caused to be made and sold, large quantities of said Manufacture of Enameled Iron Ware, and has a large quantity on hand which it is offering for sale and has made and realized large profits and advantages there-

from; but to what extent, and how much exactly, your orator does not know, and prays a discovery thereof. And your orator says that the use of the said invention by said defendant and its preparation for, and avowed determination to continue the same, and its other aforesaid unlawful acts, in disregard and defiance of the rights of your orator, have the effect to and do encourage and induce others to venture to infringe said patent in disregard of your orator's rights.

And your orator further shows unto your Honors, that it has caused notice to be given to said defendant of said infringements, and of the rights of your orator in the premises, and requested said defendant to desist and refrain therefrom; but said defendant disregarded said notice, and refused to desist from said infringements, and still continues to make and sell Manufacture of Enameled Iron Ware without right.

And your orator prays that said defendant, Haberman Manufacturing Company and its officers, directors, managers, trustees, servants, agents, attorneys and workmen, and each and every of them, may be restrained and enjoined provisionally and perpetually by the order and injunction of this Honorable Court, from directly or indirectly making, constructing, using, vending, delivering, working, or putting into practice, operation or use, or in anywise counterfeiting or imitating the said invention, or any part thereof, or any Manufacture of Enameled Iron Ware made in accordance therewith, or like or similar to those which it has heretofore made; and that the said defendant may be decreed to pay the profits unlawfully obtained by it by reason of the aforesaid infringement, and the damages thereby suffered by your orator and the costs of this suit; and that your orator may have such further relief, or such other relief, as to this Honorable Court shall seem meet, and as shall be agreeable to equity.

And for as much as your orator can have no adequate relief except in this Court, to the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief hereby prayed, and may upon the corporeal oath of one of its officers according to its

best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect answers make to the premises, and to all the several matters hereinbefore stated and charged, as fully and particularly as if severally and separately interrogated as to each and every of said matters, and may be compelled to account for and pay to your orator the profits by it acquired, and the damages suffered by your orator from the aforesaid unlawful acts.

May it please your Honors to grant unto your orator the writ of injunction, as well provisional as perpetual, issuing out of and under the seal of this Honorable Court, commanding, enjoining, and restraining the said defendant Haberman Manufacturing Company, and its officers, directors, managers, trustees, servants, agents, attorneys and workmen and each and every of them, as is hereinbefore in that behalf prayed.

May it please your Honors to grant unto your orator the writ of subpoena issuing out of and under the seal of this Honorable Court, directed to the said defendant Haberman Manufacturing Company, commanding it by a certain day, and under a certain penalty, to be and appear in this Honorable Court, then and there to answer the premises, and to stand to and abide such order and decree as may be made against it.

And your orator will ever pray, etc.

BRIESEN & KNAUTH,
Solicitors for Complainant.

ARTHUR v. BRIESEN,
of Counsel.

UNITED STATES OF AMERICA.
Southern District of New York.
State of New York.
City and County of New York. } *ss.:*

On this 8th day of September, 1891, before me personally appeared August J. Cordier, 2d Vice-President of the above named complainant, who being by me first duly sworn, deposes and says that he has read the foregoing bill of complaint subscribed by him and knows the contents thereof, and that the same is true of his

own knowledge, except as to the matters therein stated on information and belief, and as to these matters he believes it to be true; and that he verily believes Emil Kegreisz to be the true, original and first inventor of the invention described and claimed in the Letters Patent referred to in said bill of complaint.

AUGUST J. CORDIER.

Subscribed and sworn to before me this 8th day of September, 1891.

JAMES L. SUYDAM,
Notary Public.

(Seal.)

(Endorsed): United States Circuit Court, Southern District of New York.—Lalance & Grosjean Manufacturing Co. *vs.* Haberman Manufacturing Co.—Bill in Equity.—Briesen & Knauth, Complainant's Solicitors, 229 Broadway, New York.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

LALANCE & GROSJEAN MANUFACTURING COMPANY

vs.

HABERMAN MANUFACTURING COMPANY.

The answer of the Haberman Manufacturing Company, defendant, to the bill of complaint of the Lalance & Grosjean Manufacturing Company, complainant.

The defendant now and at all times hereafter saving and reserving unto itself all and all manner of benefit and advantage of exception that may be had or taken to the many errors, uncertainties and insufficiencies in the said Bill of Complaint contained, for answer thereto or unto so much thereof as the said defendant is advised it is material or necessary for it to make answer unto, answering says:

I.—That this defendant does not know and has no information sufficient to form a belief as to whether or not the complainant is a corporation duly incorporated under the laws of the State of New York and therefore denies the same and leaves the complainant to make such proof thereof as it may be advised.

II.—This defendant admits that it is a corporation organized under the laws of the State of New Jersey and having an office at Berlin Village, in the Eastern District of New York.

III.—This defendant further answering, admits that Letters Patent of the United States, numbered 279,094, were on the 5th day of June, 1883, granted to Emile

Kegreisz for certain alleged improvements in manufacture of Enameled Iron Ware, but whether or not said Letters Patent were applied for or issued as stated in said Bill of Complaint this defendant does not know and is not informed save by said Bill of Complaint and therefore denies the same and leaves the complainant to make such proof thereof as it may be advised.

IV.—This defendant further answering, says that it does not know and is not informed, save by said bill, whether or not the assignment mentioned therein from the said Emile Kegreisz to the complainant of the aforesaid Letters Patent No. 279,094 and the alleged invention thereof was made or recorded as alleged and therefore denies the same and leaves the complainant to make such proof thereof as it may be advised.

V.—And this defendant further answering, on information and belief, denies that the said Emile Kegreisz was the true, original and first inventor or discoverer of the said alleged new and useful improvements in manufacture of Enameled Iron Ware, and denies the same was not known or used prior to the alleged invention or discovery thereof by the said Emile Kegreisz, and denies that the same was not in public use or on sale in the United States for more than two years prior to his application for Letters Patent of the United States therefor.

VI.—And this defendant, further answering on information and belief, denies that the said alleged invention is fully described in the specification of said Letters Patent No. 279,094, and denies that a true description of the said invention as patented is set forth in the said specification of the said patent No. 279,094.

VII.—And this defendant further answering on information and belief, denies that the written description or specification of said alleged invention in said Letters Patent No. 279,094 conatined is in such full, clear and exact terms as to enable a person skilled in the art to which it appertains to make, construct and use the same, and denies that the principle thereof is duly explained, and

denies that the said inventor has in said Letters Petent distinguished what was alleged to be new from what was old at the date of his said alleged invention, and denies that he has in the said Letters Patent No. 279,094 particularly pointed out as new and distinctly claimed the part, improvement or combination or process which he claims as his invention in accordance with the statute in such case made and provided, and therefore alleges that for each such reason said Letters Patent No. 279,094 are of no effect in law, and void.

VIII.—And this defendant further answering on information and belief, denies that the said Emile Kegreisz was the first and original inventor of the alleged new and useful improvement in manufacture of enameled iron-ware described and claimed in said Letters Patent No. 279,094, but on the contrary avers that said alleged invention and discovery and all the material and substantial parts thereof had been prior to the alleged invention or discovery thereof by the said Emile Kegreisz, described and shown in the following United States and foreign Letters Patent and printed publications, to wit:

U. S. Letters Patent, No. 150,994, Zwietusch, May 19, 1874.

U S. Letters Patent, No. 199,743, Ransom, Jan. 29, 1878.

U. S. Letters Patent, Reissue, No. 7,900, Quinby & Whiting, October 2, 1877.

U. S. Letters Patent, No. 77,186, Greene, April 28, 1868.

U. S. Letters Patent, No. 240,876, Aliesky, May 3, 1881.

U. S. Letters Patent, No. 199,735, Niedringhaus, Jan. 29, 1878.

U. S. Letters Patent, No. 200,626, Niedringhaus, Feb. 26, 1878.

U. S. Letters Patent, No. 207,543, Niedringhaus, Aug. 27, 1878.

U. S. Letters Patent, No. 232,791, Wheatley, Sept. 28, 1880.

U. S. Letters Patent No. 255,210, Tiffany, March 21, 1882.

U. S. Letters Patent, No. 84,728, Bongardt, Dec. 8, 1868.

U. S. Letters Patent, No. 132,638, Cross, Oct. 29, 1872.

U. S. Letters Patent, No. 104,929, Callow, July 5, 1870.

U. S. Letters Patent, No. 260,973, Greenewood, July 11, 1882.

U. S. Letters Patent No. 177,332, Harris, May 16, 1876.

U. S. Letters Patent No. 173,302 Kuhn & Pew, Feb. 8, 1876.

U. S. Letters Patent No. 164,858, Mehling, June 22, 1875.

U. S. Letters Patent No. 38,412, Potter, May 5, 1863.

U. S. Letters Patent No. 247,422, Schneider, Sept. 20, 1881.

U. S. Letters Patent No. 242,728, Withers, June 7, 1881.

U. S. Letters Patent No. 257,081, Schroeder, April 25, 1882.

U. S. Letters Patent No. 259,488, Church, June 13, 1882.

U. S. Letters Patent No. 222,422, Quinby & Baldwin, December 9, 1879.

U. S. Letters Patent No. 177,953, Niedringhaus, May 30, 1876.

U. S. Letters Patent reissue, No. 7,779, Niedringhaus, July 3, 1877.

U. S. Letters Patent No. 250,102, Quinby, Nov. 29, 1881.

U. S. Letters Patent No. 250,465, Vollrath, Dec. 6, 1881.

U. S Letters Patent No. 69,318, Cheyney, October 1, 1867.

U. S. Letters Patent No. 49,708, Brown, Sept. 5, 1865.

U. S. Letters Patent No. 279,094, Kegreisz, June 5, 1883.

U. S. Letters Patent No. 189,639, Niedringhaus, April 17, 1877.

U. S. Letters Patent No. 193,422, Quinby & Whiting, July 24, 1877.

U. S. Letters Patent No. 285,645, Milligan, Sept. 25, 1883.

U. S. Letters Patent No. 190,243, Niedringhaus, May 1, 1877.

U. S. Letters Patent No. 187,886, Milligan, February 27, 1877.

U. S. Letters Patent No. 193,669, Niedringhaus, July 31, 1877.

U. S. Letters Patent No. 255,421, Dode, March 28, 1882.

U. S. Letters Patent No. 163,262, Schmidt & Radbruch, May 11, 1875.

U. S. Letters Patent No. 273,384, Peek, March 6, 1883.

U. S. Letters Patent No. 152,689, Robinson, June 30, 1874.

U. S. Letters Patent No. 227,021, Kursh, April 27, 1880.

U. S. Letters Patent No. 111,318, Clark, January 31, 1871.

U. S. Letters Patent No. 208,674, Daumesnil, Oct. 8, 1878.

U. S. Letters Patent to Okolowics, No. 208,418, Sept. 24, 1878.

U. S. Letters Patent to Scott, No. 186,886, Jan. 30, 1877.

U. S. Letters Patent to De Bussy, No. 43,630.

U. S. Letters Patent to Holley, No. 40,752.

U. S. Letters Patent to Quest, No. 48,500.

U. S. Letters Patent to Cheyney and Wallingford, No. 69,317.

English Patent No. 712 of 1870.

English Patent No. 2,790 of 1870.

English Patent No. 5,209, of 1881.

English Patent No. 13,762 of 1852.

English Patent No. 1115 of 1878.

English Patent No. 4588 of 1880.

English Patent No. 3042 of 1865.
English Patent No. 3006 of 1877.
English Patent No. 984 of 1879.
English Patent No. 11220 of 1846.
English Patent No. 10374 of 1844.
English Patent No. 3261 of 1862.
English Patent No. 1863 of 1863.
English Patent No. 9762 of 1843.
French Patent No. 5040 of May 27, 1850, of Paris.
French Patent No. 922297 of July 24, 1881 (1821) of Godin.
Belgian Letters Patent No. 47441 of 1879.

Prior Publications.

Polytechnisches Central blatt of 1852, p. 849, et seq.
Polytechnisches Central blatt of 1858, p. 1242, et seq.
Polytechnisches Central blatt of 1873, p. 595, et seq.
Deutsche Topfer und Zeigler Zeitung of 1873, No. 5.
Scientific American, Vol. VI., p. 106, et seq.
Scientific American Vol. XX., p. 103, et seq.
Scientific American Vol. XXIII., p. 278, et seq.
Scientific American, Vol. XXXVI., p. 21, et seq.
Spon's Dictionary of Industrial Arts, etc. Article on Pottery.
Pamphlet entitled Cennik kolinské továrny na emilované plechové nádobí, kuchynské, F. Odehnala *vs.* Koliné, published in Kolin, Austria, in or about 1870.
and in divers other Letters Patent and publications to this defendant at present unknown, but which when discovered, it prays may be referred to and said references added to and made a part of this its answer.

IX.—And this defendant, further answering, on information and belief says that before any alleged invention or discovery by the said Emil Kegreisz of the alleged invention or discovery described and claimed in said Letters Patent No. 279,094, the same and all material and substantial parts thereof were known to and used

by the following persons at the places set opposite their name, to wit:

Wben S. Quinby, of St. Louis, Mo., at St. Louis and elsewhere.

Joseph C. Whiting, of St. Louis, Mo., at St. Louis and elsewhere.

Frederick G. Niedringhaus, of St. Louis, Mo., at St. Louis and elsewhere.

William P. Niedringhaus, of St. Louis, Mo., at St. Louis and elsewhere.

Waldron J. Cheyney, of Wallingford, Delaware Co., Pa., at Wallingford and elsewhere.

Emil F. Dieterichs, of Philadelphia, Pa., at Philadelphia and elsewhere.

Chauncey O. Greene, of Troy, N. Y., at Troy and elsewhere.

William J. Potter, of Chicago, Ill., at Chicago and elsewhere.

Johann Bongardt, of New York, N. Y., at New York and elsewhere.

Decius W. Clark, of Chicago, Ill., at Chicago and elsewhere.

John J. Callow, of Cleveland, O., at Cleveland and elsewhere.

John R. Cross, of Morrisania, N. Y., at Morrisania and elsewhere.

Otto Zwietusch, of Milwaukee, Wis., at Milwaukee and elsewhere.

George F. Mehling, of Detroit, Mich., at Detroit and elsewhere.

Jacob Kuhn, of Grand Rapids, Mich., at Grand Rapids and elsewhere.

Alfred Pew, of Grand Rapids, Mich., at Grand Rapids and elsewhere.

Theodore S. Ransom, of Somerville, Mass., at Somerville and elsewhere.

Frank Kursh, of Philadelphia, Pa., at Philadelphia and elsewhere.

Thomas J. Wheatley, of Cincinnati, O., at Cincinnati and elsewhere.

Charles F. Aliesky, of Brooklyn, N. Y., at Brooklyn and elsewhere.

Karl Schneider, of Jersey City, N. J., at Jersey City, and elsewhere.

Melvin B. Church, of Grand Rapids, Mich., at Grand Rapids and elsewhere.

William Schroeder, of San Francisco, Cal., at San Francisco and elsewhere.

Louis C. Tiffany, of New York, N. Y., at New York and elsewhere.

William F. Peek, of Brooklyn, N. Y., at Brooklyn and elsewhere.

John T. Greenwood, Jr., of Beloit, Wis., at Beloit and elsewhere.

Andrew J. Harris, of Providence, R. I., at Providence and elsewhere.

Samuel Withers, of Philadelphia, Pa., at Philadelphia and elsewhere.

Jacob J. Vollrath, of Sheboygan, Wis., at Sheboygan and elsewhere.

Morgan W. Brown, of Morrisania, N. J., at Morrisania and elsewhere.

John C. Milligan, of Brooklyn, N. Y., at Brooklyn and elsewhere.

Jules Chaumont, of Woodhaven, N. Y., at Woodhaven and elsewhere.

John C. Milligan, of South Orange, N. J., at South Orange and elsewhere.

George Booth, of Philadelphia, Pa., at Philadelphia and elsewhere.

Carl A. Vollrath, of Sheboygan, Wis., at Sheboygan and elsewhere.

John R. Riess, of Sheboygan, Wis., at Sheboygan and elsewhere.

F. Odehnala, of Brooklyn, N. Y., at Brooklyn and elsewhere; and also by divers other persons at present unknown to this defendant, whose names and places of residence, when discovered, this defendant prays may be added to and made a part of this its answer.

X.—And this defendant further answering, on infor-

mation and belief, avers that all the claims of the said Letters Patent No. 279,094 are void, in that they are for incomplete and inoperative processes and combinations.

XI.—And this defendant further answering, on information and belief, avers that the said Letters Patent No. 279,094 are void, in that in view of the state of the art at and prior to the date of the said alleged invention of the said Emil Kegreisz, it required no invention to produce the said alleged improvements, and that the said alleged improvements therein claimed are not patentable inventions or improvements within the meaning of the law and were not and are not useful.

XII.—And this defendant further answering, on information and belief, avers that the alleged inventions covered by the claims of the said Letters Patent No. 279,094 formed no part of the original inventions of the said Emile Kegreisz, nor of the original application for Letters Patent upon which the said Letters Patent were granted, but that said alleged inventions were made and such claims introduced in said application long after the filing of the said application, and that new matter was introduced into the said application describing and setting out the alleged inventions recited in the claims of the said patent, all without authority of law and contrary to law; and that the alleged inventions recited in the claims of said Letters Patent No. 279,094 are distinct and different from any described or claimed in the said original application, and that for each of the said reasons the said patent is void, as never having been applied for in due form of law.

XIII.—And this defendant further answering, on information and belief, avers that the said Letters Patent No. 279,094 were obtained through and by means of fraud on the part of the applicant and of his fraudulent misrepresentations, and that by reason of such fraud and misrepresentations the said Letters Patent are granted unto Emile Kegreisz for different inventions from those shown and described and claimed in the original application, and that for this reason the said patent is void and of no effect in law.

XIV.—And this defendant further answering, on information and belief, avers that the alleged inventions recited in the claims of said Letters Patent No. 279,094 were abandoned to the public by said Emile Kegreisz prior to his application for the granting of said patent and that for this reason said patent is void and of no effect in law.

XV.—And this defendant further answering, on information and belief,denies that said Emile Kegreisz was the true inventor of the alleged improvements claimed in the claims of the said Letters Patent No. 279,094, and on information and belief avers that the said Emile Kegreisz surreptitiously or unjustly applied for and obtained a patent for what was in fact invented by others who were using reasonable diligence in adapting and perfecting the same, and who disclosed the same to said Emile Kegreisz, and that therefore the said patent is null and void and of no effect in law.

XVI.—And this defendant further answering, on information and belief, avers that for the purpose of deceiving the public the description in the specification filed by the said Emile Kegreisz in the United States Patent Office, pursuant to which the said Letters Patent No. 279,094 were issued, were made in part to contain less than the whole truth relative to the alleged inventions or discoveries, and in part to contain more than is necessary to use and embody the alleged inventions, and in part to contain inaccurate and false and misleading representations as to the said alleged inventions and that for each of the said reasons said patent is of no effect and void.

XVII.—And this defendant further answering, on information and belief, avers that the alleged improvements claimed in the claims of the said patent No. 279,094, if patentable at all, were not and are not patentable in the form or manner in which the said alleged improvements are patented or claimed in the said patent, and that for this reason the said patent is null and void and of no effect in law.

XVIII.—And this defendant further answering, on information and belief, avers that the alleged improvements described and claimed in said Letters Patent No. 279,094 had been in public use and on sale in the United States for more than two years prior to the filing of the application for a patent therefore, and that therefore the said patent is null and void and of no effect in law.

XIX.—And this defendant further answering, on information and belief, denies that by reason of the granting of the said Letters Patent No. 279,094 or for any other reason the complainant herein has the full and exclusive right and liberty of making, constructing, useing and vending to others to be used the said alleged improvements described and claimed in said patent and denies that any such rights and privileges as are set out in the Bill of Complaint herein were or are secured to the said complainant by reason of the said Letters Patent.

XX.—And this defendant further answering, says that it does not know and is not informed save by said bill whether or not the complainant herein has invested and expended large sums of money and has been to great trouble in and about the said alleged invention for the purposes mentioned in the said complaint or for any other purposes, and therefore denies the same and leaves the complainant to make such proof thereof as it may be advised.

XXI.—And this defendant further answering, upon information and belief, denies that said alleged inventions described and claimed in the said patent have been or are of great benefit and advantage, and denies that large quantities of said alleged improvements were made according to said invention, and sold by the complainant herein to the great advantage of the public, and denies that the public have generally acknowledged and acquiesced in the alleged rights of the complainant, and denies that there has been any public recognition of or acquiesence in the validity of said Letters Patent or the alleged rights of the complainant therein.

XXII. And this defendant further answering, on information and belief, avers that the said Letters Patent No. 279,094 are void and of no effect in law in that the claims of said patent describe and recite two separate and distinct inventions which were not properly or lawfully patentable in one and the same patent.

XXIII.—And this defendant further answering denies each and every the allegations of infringement in the said Bill of Complaint contained, and denies that it has ever made, constructed, used, or vended to others to be used, the said alleged improvements or any of them; and denies that it has in any way whatsoever infringed upon the alleged rights of the complainant under and by virtue of the said patent; and denies that it has ever threatened, or is now threatening, to make, use or sell said alleged improvements or any of them in any quantities whatever, or to supply the market therewith.

XXIV.—And this defendant further answering, upon information and belief, denies that the complainant his suffered great and irreparable loss and injury, or any loss or injury whatever by reason of any unlawful acts and doings of the defendant; and denies that, by reason of any unlawful acts and doings of this defendant, the complainant has been, and still is being deprived of great gains and profits which it, the complainant, might and otherwise would have obtained but for the said alleged unlawful acts and doings, and denies that the defendant has received and enjoyed any gains or profits whatsoever by reason of any violation of the rights of the complainant; and denies that the defendant in any way encouraged or induced others to venture to infringe said patent in disregard of the alleged rights of the complainant.

XXV.—And this defendant further answering denies that the complainant has caused notice to be given to the defendant of said alleged infringement or of said alleged rights of the complainant; and denies that the complainant has ever requested the defendant to desist or refrain from any alleged infringement.

XXVI.—And this defendant further answering, submits that the complainant is not entitled to the relief sought for in the said Bill of Complaint nor to any relief whatever.

XXVII.—And this defendant denies all and all manner of unlawful combination and confederacy wherewith by the said Bill of Complaint it is charged, and prays the same benefit of the facts and things herein set forth as if for the reason thereof it had demurred to the said Bill of Complaint where demurrer would have been proper, and the same benefit thereof as if it had specially pleaded to the said bill where a special plea would have been proper; and it submits to this Honorable Court and insists that the premises considered the complainant has no right to any further answer to said bill or any part thereof than is hereinbefore contained, and no right to any accounting, discovery, injunction, or any relief prayed for in said bill, and this defendant prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE HABERMAN MFG. CO.,
By Louis Fisher, Prest.,
Defendant.

GUGGENHEIMER & UNTERMYER,
Solicitors for Defendant,
46 Wall St., N. Y. City.

Witter & Kenyon,
Of Counsel.

United States of America,
Southern District of New York,
City and County of New York.

Louis Fisher, being duly sworn, deposes and says that he is the President of the Haberman Manufacturing Company, the defendant named in the foregoing answer: that he has read the said answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on

information and belief, and as to those matters he believes it to be true.

LOUIS FISHER.

Subscribed and sworn to before me this 13th day of November, 1891.

[SEAL.] EDWARD J. KRUG, Jr.,
Commissioner of Deeds,
N. Y. Co.

(Endorsed): United States Circuit Court, Southern District of New York.—Lalance & Grosjean Manufacturing Co. vs. Haberman Manufacturing Co. Action No. 1.—Answer Guggenheimer & Untermeyer, Solicitors for Defendants, No. 40 Wall St., New York City.—U. S. Circuit Court, filed Nov. 14, 1891, John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LALANCE & GROSJEAN MANUFACTURING CO.

vs.

HABERMAN MANUFACTURING CO.

In Equity. No. 5,182.

The replication of Lalance & Grosjean Manufacturing Company, complainant, to the answer of Haberman Manufacturing Company, defendant.

This repliant, saving and reserving unto itself now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain, and prove its said bill of complaint to be true, certain and sufficient in law to be answered to, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant.

Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it has already prayed,

BRIESEN & KNAUTH,
Solicitors for Complainant.

(Endorsed): United States Circuit Court, Southern District of New York. In Equity. Lalance & Grosjean Mfg. Co. vs. Haberman Mfg. Co. No. 5,182. Replication. Briesen & Knauth, Solicitors for Complainant, No. 229 Broadway, New York, N. Y. U. S. Circuit Court, Filed Dec. 7, 1891. John A. Shields, Clerk.

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, held at the Court Rooms of said Court, in the City of New York, in the State of New York, on the 5th day of January, 1893.

Present:—The Honorable Alfred C. Coxe, Judge.

The Lalance & Grosjean Manufacturing Company,
Complainant,

vs.

Haberman Manufacturing Company,
Defendant.

In Equity.
No. 5182.

This cause having come on for final hearing upon the bill of complaint, the answer thereto of the defendant, the replication of the complainant to such answer, and proofs taken on the part of the complainant and on the part of the defendant, and Mr. Arthur v. Briesen having been heard on behalf of the complainant, and Mr. Robert N. Kenyon on behalf of the defendant.

Now, therefore, upon consideration thereof, and on motion of Briesen & Knauth, solicitors for the complainant, and due deliberation had, it is hereby

Ordered, adjudged and decreed, that the Letters Patent of the United States, issued to Emile Kegreisz on the 5th day of June, 1883, numbered 279,094 for Manufacture of Enameled Iron Ware are good and valid in law; and that the complainant herein is entitled to the exclusive rights in, to and under said Letters Patent, and in and to the invention and improvements secured thereby; and that the title thereto is duly vested in the Complainant; and that the defendant has infringed upon the said Letters Patent, and upon the exclusive rights of the Complainant thereunder; by making, using and vending

to others to be used Enameled Iron Ware made according to, and employing and containing the invention and improvements described in said Letters Patent, and claimed in the claims thereof.

And it is further ordered, adjudged and decreed, that the Complainant do recover from the defendant the Haberman Manufacturing Company the gain, profits, savings and advantages which the said defendant has derived, received, or made by reason of the infringement of the complainant's exclusive rights under said Letters Patent by any manufacture, use or sale of Enameled Iron Ware containing the invention and improvements described in said Letters Patent, and claimed in the claims thereof, or any of them; and that the said complainant do also recover, in addition thereto, any and all damages which it has sustained by reason of such infringement of its exclusive rights by the said defendant. And it is hereby referred to John A. Shields, Esquire, counsel having requested such appointment and sufficient reason appearing therefor, to ascertain, take and state the number of articles of Enameled Iron Ware made and the number used, and the number sold by the said defendant, the Haberman Manufacturing Company, in infringement of the claims of said Letters Patent, or any of them, and the number of such articles of Enameled Iron Ware which the said defendant has on hand, and the gains, profits, savings and advantages derived by the said defendant from and through the said infringements, and to assess the damages thereby suffered by the said Complainant, and to report thereon to the Court with all convenient speed. And the said defendant, the Haberman Manufacturing Company is hereby directed and required to attend before the said Master, from time to time, as required by said Master, and to produce before him such books, papers, exhibits, statements, vouchers and documents as it may be directed by the said Master to produce, and to submit to such oral, or other examination, as the Master may direct.

And it is further ordered, adjudged and decreed, that a perpetual injunction be issued out of and under the seal of this Court enjoining and restraining the defendant

the Haberman Manufacturing Company, and its servants, agents, attorneys and workmen, from directly or indirectly making or causing to be made, delivering, vending, or causing to be sold, offering for sale, using or causing to be used in any manner, any articles of Enameled Iron Ware like or similar to those which the said defendant has heretofore made, used, or sold, containing or embodying the invention and improvements described in said Letters Patent numbered 279,094 and claimed in the claims thereof, or any of them, and from counterfeiting or imitating the said invention and improvements or any part or parts thereof, in any way whatsoever.

And it is further ordered, adjudged and decreed that the Complainant do recover from the defendant, the Haberman Manufacturing Company, the costs, charges and disbursements of this suit to be taxed, and that the question of increase of damages and all further questions be reserved until the coming in of the Master's report.

ALFRED C. COXE,
U. S. J.

(Endorsed): Circuit Court of the United States, for the Southern District of New York. In the Second Circuit. The Lalance & Grosjean Manufacturing Company vs. Haberman Manufacturing Co. In Equity. Interlocutory Decree. Briesen & Knauth, Solicitors for Complainant, 229 Broadway, New York.

(Endorsed): Take notice, that we shall to-day present the Interlocutory Decree, of which the within is a copy to John A. Shields, Esq., the Clerk of this Court with the request that he present the same to his Honor Judge Coxe, for settlement.—New York, 22d December, 1892.—To Messrs. Guggenheimer & Untermyer, Solicitors for Defendant.—Due service of notice and proposed Interlocutory Decree admitted this 22d day of December, 1892, together with a copy of letter to Judge Coxe.—U. S. Circuit Court, filed Jan. 5, 1893, John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE LALANCE & GROSJEAN MANUFACTURING COMPANY

vs.

HABERMAN MANUFACTURING COMPANY.

Memorandum on Motion to stay Injunction.

COXE, *J.:* This motion presents the situation which usually arises where a patent has been sustained.

The defendant asserts that his business will be irreparably injured if he is compelled to stop infringing. The complainant, on the other hand, is equally strenuous in contending that his business will be destroyed if the infringement continues. If the two parties stood on equal footing the question would be a difficult one. But they do not. The complainant is the owner of a valid patent and the defendant is a trespasser. The one is right and the other is wrong.

In such circumstances the former is entitled to relief. The rule as enunciated in Pasteer *vs.* Blount, 51 Fed. Rep., 610, is not as I understand it, the law of this Circuit.

The injunction has sometimes been suspended here after final hearing, but only in exceptional cases. This is not such a case.

I am convinced that the rights of the public will not suffer and that defendant's employees will not be disturbed if the usual course is adopted here. The defendant can enamel its goods in any way it sees fit, and the record shows that the ways are numerous, so long as it does not use the patented process.

That any injury will result other than that which generally follows where an injunction overtakes an infringer

I cannot believe. The injury here will not be unusual or exceptional.

A bond will offer little or no indemnity. An injunction is the complainant's only available remedy.

I think the case should take the ordinary course.

The motion is denied.

(Endorsed): United States Circuit Court, Southern District of New York. Lalance & Grosjean Manufacturing Co. vs. Habermann Manufacturing Co. A Decision: Coxe, J.—U. S. Circuit Court, filed Jan. 5, 1893, John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE LALANCE & GROSJEAN MANUFACTURING COMPANY, *against* THE HABERMAN MANUFACTURING CO.	In Equity.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To The Haberman Manufacturing Company, its servents, agents, attorneys and workingmen, GREETING:—

Whereas it has been represented to us in our Circuit Court of the United States, for the Second Circuit, and Southern District of New York, that Letters Patent of the United States No. 279,094 were issued in due form of law on the 5th day of June, 1883, to Emile Kegreisz, for improvements in manufacture of Emameled Iron Ware, and that the Lalance & Grosjean Manufacturing Company is entitled to the exclusive rights in, to and under said Letters Patent No. 279,094, and in and to the invention and improvements secured thereby, and that you, the said Haberman Manufacturing Company, have infringed upon said Letters Patent, and upon the exclusive rights of said Lalance & Grosjean Manufacturing Company thereunder, by making, using and vending to others to be used iron ware made according to and employing and containing the invention and improvements described in said Letters Patent No. 279,094, and claimed in the claims thereof; Now, THEREFORE, we do strictly command and enjoin you, the said Haberman Manufacturing Company, and your servants, agents, attorneys and workingmen, under the penalties that may fall upon you in case of disobedience, that you forthwith and finally and perpetually desist from directly or indirectly making, constructing, using, vending, delivering, working, or putting

into practice, operation or use, or in any way counterfeiting or imitating the said invention, or any part thereof, or any manufacture of enameled iron ware made in accordance therewith, or alike or similar to those which the said defendant has heretofore made, used or sold, containing or embodying the invention and improvements described in said Letters Patent No. 279,094, and claimed in the claims thereof, and from counterfeiting or imitating the said invention and improvement, or any part or parts thereof, in any way whatsoever.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of New York, in the Southern District of New York, this fifth day of January, 1893.

JOHN A. SHIELDS,
[SEAL.] Clerk.

(Endorsed): Docket No. 5,182.—United States Circuit Court, Southern District of New York.—Lalance & Grosjean Manufacturing Co. vs. Haberman, Manufacturing Co.—Case 1, Injunction—Briesen & Knauth, Solicitors for Complainants, 229 Broadway, New York.

(Endorsed): I hereby certify that on the 6th day of January, 1893, I personally served the within injunction upon the within named Louis Haberman, Louis Fisher, Samuel Untermyer, George D. Maborn and Robert N. Kenyon by exhibiting to each of them the within original, and at the same time leaving with each of them, a copy thereof. Tack a copy of injunction on the Haberman Manufacturing Co., at Berlin Village, Long Island, and exhibiting the original to the superintendent at said factory whose name is unknown to me. Isaac Untermyer not found, is in Europe. J. W. Jacobus, United States Marshal, Southern District of New York. I hereby certify that on the 5th day of January 1893, at the City of New York, in my district, I personally served the within injunction

upon the within named Frederick Haberman and Adolph Steinhardt by exhibiting to each of them the within original, at the same time leaving with each of them a copy thereof. JOHN W. JACOBUS, United States Marshal, Southern District of New York. F. B. U. S. Circuit Court, filed Jan. 16, 1893, JOHN A. SHIELDS, Clerk.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

LALANCE & GROSJEAN MANUFACTURING Company, Respondent, *against* HABERMAN MANUFACTURING Co., Appellant.	In Equity. No. 5,182.

The above named defendant, the Habermann Manufacturing Company, conceiving itself aggrieved by the interlocutory decree granting an injunction and directing an account of profits and damages entered in the above entitled suit on the day of January, 1893, does hereby appeal from said decree to the Circuit Court of Appeals of the United States in and for the Second Circuit, and it prays that this, its appeal, may be allowed; and that a transcript of the record and proceedings and papers, and the exhibits on which said decree was made, duly authenticated, may be sent to the Circuit Court of Appeals of the United States in and for the Second Circuit.

New York, January 6th, 1893.

THE HABERMAN MANUFACTURING Co.,
By Lewis Haberman, Vice-Prest.
GUGGENHEIMER & UNTERMEYER,
Solicitors for Defendant.

And now, to wit, January 7th, 1893,

It is ordered that the appeal be allowed as prayed for and that a citation issue returnable in 20 days from the day of signing the same.

E. HENRY LACOMBE.

(Endorsed): United States Circuit Court, Southern District of New York.—In Equity, No. 5182.—Lalance

& Grosjean Mfg. Co. *vs.* Haberman Mfg. Co.—Petition on Appeal—Original.—Guggenheimer & Untermyer, Solicitors for Deft., Potter Building, 38 Park Row, New York.—Due and timely service of copy of within is hereby admitted, Jan. 7th, 1893.—Briesen & Knauth, Sols. for Complts.—U. S. Circuit Court, Filed, Jan. 9, 1893, John A. Shields, Clerk.

United States of America, ss.:

To the Lalance & Grosjean Manufacturing Company,

GREETING:

You are hereby cited and admonished to be and appear at a Circuit Court of Appeals of the United States in and for the Second Circuit to be holden on the 27th day of January, A. D. 1893, pursuant to an appeal filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein the Haberman Manufacturing Company is appellant and you are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated, January 7th, 1893.

E. HENRY LACOMBE.

(Endorsed): United States Circuit Court, Southern District of New York. In Equity No. 5182—Lalance & Grosjean Mfg. Co. *vs.* Haberman Manufacturing Company—Original Citation—Guggenheimer & Untermyer, Solicitors for Deft., Potter Building, 38 Park Row, New York. Due and timely service of copy of within is hereby admitted, Jan. 7th, 1893.—Briesen & Knauth, Solrs., for Complts.—U. S. Circuit Court, Filed Jan. 9, 1893, John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

LALANCE & GROSJEAN MANUFACTURING COMPANY, Respondent, *agst.* HABERMAN MANUFACTURING COMPANY, Appellant.	In Equity. No. 5,182.

KNOW ALL MEN BY THESE, PRESENTS, that we, Frederick Haberman and Simon Haberman, both of the City, County and State of New York, are held and firmly bound unto the above named complainant, the Lalance & Grosjean Manufacturing Company, in the sum of Five hundred dollars, to be paid to the said complainant, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

SEALED with our seals and dated the sixth day of January, in the year of our Lord, one thousand eight hundred and ninety-three.

WHEREAS, the above named defendant, the Haberman Manufacturing Company, is about to prosecute an appeal to the Circuit Court of Appeals of the United States in and for the Second Circuit, to reverse the interlocutory decree entered herein on the fifth day of January, 1893, in the above entitled suit;

NOW, THEREFORE, the condition of this obligation is such that if the above named defendant shall prosecute its appeal to effect and answer all damages and costs, if it fails to make said appeal good, then said obligation shall be

void, otherwise the same shall be and remain in full effect and virtue.

FREDERICK HABERMAN. [SEAL.]
SIMON HABERMAN. [SEAL.]

[SEAL.]

Sealed and delivered and acknowledged before me this sixth day of January, 1893, by Frederick Haberman.

EDITH J. GRISWOLD,
Notary Public 141,
New York County.

Sealed and delivered and acknowledged before me this sixth day of January, 1893, by Simon Haberman.

[SEAL.]

LOUIS CURTIS,
Com. of Deeds,
N. Y. City.

UNITED STATES OF AMERICA,
Southern District of New York. } ss.:

Frederick Haberman, of the City, County and State of New York, being duly sworn, deposes and says, that he resides in the City of New York; that he is a freeholder within this State, and that he is worth the sum of One thousand dollars over and above all his just debts and liabilities, exclusive of property exempt by law from levy and sale under an execution.

FREDERICK HABERMAN.

Sworn to before me this 6th day of January, 1893.

[SEAL.] EDITH J. GRISWOLD,
Notary Public 141,
New York County.

Approved:

E. HENRY LACOMBE.

UNITED STATES OF AMERICA, }
Southern District of New York. } ss.:

Simon Haberman, of the City, County and State of New York, being duly sworn, deposes and says: that he resides in the City of New York; that he is a freeholder within this State, and that he is worth the sum of One thousand dollars over and above all his just debts and liabilities exclusive of property exempt by law from levy and sale under an execution.

SIMON HABERMAN.

Sworn to before me this sixth }
day of January, 1893. }

LOUIS CURTIS,
Com. of Deeds,
N. Y. City.

[SEAL.]

(Endorsed): United States Circuit Court, Southern District of New York, In Equity, No. 5182.—Lalance & Grosjean Mfg. Co. *vs.* Haberman Mfg. Co. —Bond.—Guggenheimer & Untermyer, Solicitors for Deft., Potter Building, 38 Park Row, New York.—Due and timely service of copy of within is hereby admitted.—U. S. Circuit Court, Filed Jan. 7, 1883, John A. Shields, Clerk.

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held at the Post Office Building in the City of New York on the 20th day of January, 1893

Present—Hon. ALFRED C. COXE,
Judge.

LALANCE & GROSJEAN MANUFACTURING COMPANY *vs.* HABERMAN MANUFACTURING COMPANY.	In Equity, Docket No. 5,182

Defendant's motion for a stay of proceedings in this Court in the above entitled case, pending an appeal from the interlocutory decree herein, including a stay of the injunction, and for the acceptance and approval of a supersedeas bond for that purpose, having come on to be argued, now, after considering the affidavits of George D. Mabon, Louis Haberman, Robert N. Kenyon, Esq., and Frederick Haberman in support of said motion, and the affidavit of Mr. Cordier in opposition thereto, and the defendant having offered to file a supersedeas bond in any amount satisfactory to the Court. It is

Ordered, that the said motion be and the same is hereby denied.

ALFRED C. COXE,
U. S. J.

A copy,
JOHN A. SHIELDS,
Clerk.

UNITED STATES CIRCUIT COURT.

Southern District of New York.

In Equity.

Lalance & Grosjean Manufacturing Company. *vs.* Haberman Manufacturing Company.	No. 5,182.

I, John A. Shields, Clerk of the United States Circuit Court for the Southern District of New York, do hereby certify that the foregoing are true transcripts of the bill of complaint in the above entitled cause; of the answer; of the replication; of the decree entered in the said cause on January 5th, 1893; of the opinion of his Honor, Judge Coxe, on a motion for a stay of all proceedings in this Court pending an appeal to the Circuit Court of Appeals from the said decree; of the writ of injunction issued in said suit and the return endorsed thereon; of the petition on appeal; of the citation; of the bond on appeal; and of the order entered on January 21st, 1893.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court at New York City, this 21st day of January, 1893.

JOHN A. SHIELDS,
Clerk.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

LALANCE & GROSJEAN MANUFACTURING COMPANY, Respondent, *against* HABERMAN MANUFACTURING COMPANY, Appellant.	In Equity. No. 5,182.

Know all men by these presents, That we, Frederick Haberman and J. H. Loewenstein, both of the City, County, and State of New York, are held and firmly bound unto the above-named Complainant, the Lalance and Grosjean Manufacturing Company, in the sum of ten thousand dollars, to be paid to the said Complainant for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 18th day of January, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, the above-named defendant, the Haberman Manufacturing Company, is about to prosecute an appeal to the Circuit Court of Appeals of the United States in and for the Second Circuit, to reverse the 5th interlocutory decree entered herein on the fifth day of January, 1893, in the above-entitled suit:

Now, therefore, the condition of this obligation is such that if the above-named defendant shall prosecute its appeal to effect, and shall answer all damages if it fails to make said appeal good, then said obligation shall

be void, otherwise the same shall be and remain in full effect and virtue.

J. H. LOWENSTEIN (L.S.)
FREDERICK HABERMAN (L.S.)

Sealed and delivered and acknowledged before me this 18th day of January, 1893.

W. H. HORSMAN,
[SEAL.] Notary Public No. 304,
New York County.

UNITED STATES OF AMERICA.
Southern District of New York. } s.s

FREDERICK HABERMAN, of the City, County, and State of New York, being duly sworn, deposes and says: That he resides in the City of New York; that he is a freeholder within this State, and that he is worth the sum of twenty thousand dollars over and above all his just debts and liabilities, exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me, this 18th day of January, 1893.

FREDERICK HABERMAN.

[SEAL] W. H. HORSMAN,
Notary Public 304,
New York County.

Approved.

UNITED STATES OF AMERICA. }
Southern District of New York. } S.S.

J. H. LOEWENSTEIN, of the City, County, and State of New York, being duly sworn, deposes and says: That he resides in the City of New York; that he is a freeholder within this State, and that he is worth the sum of twenty thousand dollars over and above all just debts and liabilities exclusive of property exempt by law from levy and sale under an execution.

J. H. LOEWENSTEIN.

Sworn to before me, this }
18th day of January, 1893. }

[SEAL] W. H. HORSMAN,
Notary Public No. 304,
New York County.

Approved.